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IN THE

Supreme Court Of The United States

October Term, 1982

CHARLES KING,
Petitioner

v.

COMMONWEALTH OF KENTUCKY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF KENTUCKY

ROBERT LESLIE ROSENBAUM, ESQ.
ROSENBAUM & ROSENBAUM
Suite 300, The Lexington Building
201 West Short Street
Lexington, Kentucky 40507
(606) 259-1321

PRINT MASTER, INC., 630 LANE ALLEN RD., LEXINGTON, KY. 40504, PH. (606) 276-6341

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Supreme Court Of The United States

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CHARLES KING, *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, *Respondent*

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Charles King, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered in the above entitled case on December 23, 1981.

QUESTIONS PRESENTED

I. WHETHER THE ACTIONS OF THE KENTUCKY TRIAL AND APPELLATE COURTS IN ALLOWING THE PROSECUTION'S USE OF TAPED CONVERSATIONS OF CO-DEFENDANTS AND OF ONE OTHER PERSON WITHOUT PRODUCING THE DECLARANTS FOR CROSS-EXAMINATION ARE IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND PRESENT AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE DECIDED BY THIS COURT?

II. WHETHER THE APPLICATION OF KY. REV. STAT. §510.145, "THE RAPE SHIELD LAW," WHICH PROHIBITED PETITIONER FROM CROSS-EXAMINATION TO SHOW BIAS, MOTIVE AND IMPEACH CREDIBILITY RAISES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, IN THAT IT DENIED PETITIONER HIS RIGHT TO CONFRONTATION?

III. WHETHER THE FAILURE TO GIVE PETITIONER'S REQUESTED CORROBORATION INSTRUCTION PURSUANT TO RCr 9.62 VIOLATED THE PROHIBITION AGAINST EX POST FACTO LAWS IN ARTICLE I OF THE UNITED STATES CONSTITUTION WHICH RAISES AN IMPORTANT FEDERAL QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT?

IV. WHETHER THE TRIAL AND APPELLATE PROCEEDINGS WERE TAINTED BY A SERIES OF PREJUDICIAL ERRORS THAT WHEN TAKEN INDIVIDUALLY OR AS A WHOLE, RENDERED THE CONVICTION SO FUNDAMENTALLY UNFAIR AND IN DIRECT CONFLICT WITH A DECISION OF THIS COURT THAT IT DENIED THE PETITIONER DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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Tanford & Bocchino, *Rape Victim Shield Laws and The Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980) 23

OPINIONS BELOW

The judgment of the Fayette Circuit Court, Second Division of November 18, 1980, the December 23, 1981, Opinion of the Court of Appeals of Kentucky (of which review is sought), the Order Denying Petition For Rehearing of February 26, 1982, the May 18, 1982, Order Denying Discretionary Review in the Supreme Court of Kentucky and the May 21, 1982 Order Granting Stay of Execution are reprinted in Appendix A hereto. All of the above-mentioned opinions are unreported.

JURISDICTION

The opinion of the Court of Appeals of Kentucky (Appendix A, page 5a) was entered on December 23, 1981, affirming petitioner's conviction. A timely petition for rehearing was denied on February 26, 1982. The Order Denying Discretionary Review was entered in the Supreme Court of Kentucky on May 18, 1982, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTORY PROVISIONS INVOLVED

The following are the constitutional, statutory and rule provisions involved in this petition and are reprinted in pertinent part in Appendix B hereto:

U.S. Const. art. I, §10, cl. 1

U.S. Const. amend. VI

U.S. Const. amend. XIV, §1

Liability for conduct of another—Complicity, Ky. Rev. Stat. Ann. §502.020 (Bobbs-Merrill 1975).

Definitions—Forcible Compulsion, Ky. Rev. Stat. Ann. §510.010(2) (Bobbs-Merrill 1975).

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Testimony of accomplice, Ky. Rev. Stat. Ann. RCr 9.62 (Bobbs-Merrill 1972) (Abolished effective Sept. 1, 1980).

STATEMENT OF THE CASE

Charles King was found guilty in the Fayette Circuit Court, Lexington, Fayette County, Kentucky, of rape in the first degree of Sue Blevins and of promoting the prostitution activities of Sue Blevins. He was sentenced to fifteen years imprisonment. (R 67-70, V IV p 491-492).[1]

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[1] All proceedings which are not stenographically reported will be referred to as the Record and noted by the letter R. Proceedings stenographically reported and transcribed consist of five volumes. The first volume is a transcript of a hearing on pre-trial motions and will be referred to by the letters PT, followed by the page number at which point the evidence appears. The proceedings at trial are transcribed in four volumes with pages consecutively numbered from 1 to 500. The stenographically reported transcription of the trial proceedings will be referred to by the letter, V, for the volume, followed by roman numeral I through IV, for the particular volume referred to, followed by the letter, p, for the page on which the evidence is found.

Ky. Rev. Stat. §510.040(1)(a) states, "A person is guilty of rape in the first degree when: he engages in sexual intercourse with another person by forcible compulsion; . . ." Ky. Rev. Stat. Ann. §510.040 (Bobbs-Merrill 1975) [Hereinafter cited as Ky. Rev. Stat. unless a different edition date]. It is admitted that petitioner did not have sexual intercourse with Sue Blevins (V II p 228). The petitioner was found guilty of the rape under another statutory provision, Ky. Rev. Stat. §502.020(1), which is termed a "complicity" statute. The complicity statute states a person is guilty of an offense committed by another when with the intent of promoting or facilitating the commission of the offense, he either engages in a conspiracy with the other person to commit the offense or he aids, counsels, or attempts to aid the other person in committing the offense.

The rape charge grew out of events occurring on or about February 24, 1980, and the prostitution charge arose out of events also occurring in February, 1980 (R 2-3).

The indictment against petitioner was in three counts. The first count charged that petitioner, Anthony Rucker and Gary Blevins, husband of Sue Blevins, committed the offense of rape by making Sue Blevins engage in sexual intercourse with Anthony Rucker by forcible compulsion. The second count of the indictment charged that petitioner, Gary Blevins, and Buck Johnson committed the offense of rape by making Sue Blevins engage in sexual intercourse with Buck Johnson by forcible compulsion. The third count of the indictment dealt with the prostitution offense. (R 2-3). Before a brief review of the evidence, it is useful to state the names and relationships of the actors in this case.

Sue Blevins was seventeen years old at the time of trial and was married to the co-defendant, Gary Blevins (V II p 196-197). The petitioner was forty years old at the time of trial and was married to Eleanor King. The events in question took place at a building owned by the Kings, housing a laundromat and apartments (V III p 304-305, 403). Gary Blevins worked in the petitioner's vending machine business (V III p 362), and Sue worked in the laundromat (V III p 305, V II p 200). Anthony Rucker and Buck Johnson were present when the alleged rape occurred (V III p 347, 384-385, 391).

The prostitution charge arose out of an incident involving a man named Gene Ross (V I p 97-98). Sue testified petitioner had requested a girl named Kim Christianson to be a pimp for Sue's prostitution activities (V II p 201-202). Gene Ross was at the laundromat to do some plumbing work (V III p 362-364). Sue testified she willingly engaged in sexual intercourse with Gene Ross at Kim's request (V II p 202-203, 235). Kim testified Gene Ross paid $30.00 for the sex and Kim received $10.00 and petitioner received $20.00 (V I p 81). Although Kim's testimony incriminated the petitioner, Kim had given a sworn statement before trial that the sexual activity and payment were solely the result of an arrangement between Gene Ross and Sue, and petitioner had no knowledge of the transaction before it occurred (V I p 80-89).

Gene Ross testified he had been propositioned by Kim while doing work at the laundromat (V I p 99-101). Ross stated King did not have him come to the laundromat in order to engage in prostitution activities (V I p 105). King was not present when the sex occurred (V I p 105).

King discussed the prostitution with Gary and Sue and informed them that this kind of activity was unacceptable and Sue would have to leave if she wanted to be a prostitute (V III p 368-371).

On or about February 24, 1980, a Saturday, Sue told the petitioner's young daughter about the prostitution, and King's wife was informed of this event that day (V II p 205-206). Eleanor King came to the laundromat, became angry, and slapped Sue, Gary, and the petitioner (V II p 206). Thereafter, Sue informed the petitioner's wife that Sue had been to bed with the petitioner (V II p 242-245).

Sue testified she was angry with petitioner's wife because she slapped Sue, and Sue stated she would like to get even with them and that she always tries to pay people back who hurt her (V II p 246-247).

After petitioner's wife left, petitioner tape-recorded a conversation between Sue and him. The first part of the tape was made by the petitioner, but more conversations were on the tape, and it is disputed as to who made the second part of the tape recording. Petitioner stated the first part of the tape recording was made at 5:00 or 6:00 o'clock p.m. Sue admitted on the tape that she had lied to petitioner's wife. Petitioner was angry with Sue and told her he had something planned for her, but did not tell her what it was. The plan was to evict Sue and her husband from the apartment (V III p 378-380). Later, petitioner told Gary he and his wife had to leave, but Gary didn't want to leave, and so petitioner stated Gary could stay, but Sue had to leave. Gary said he could not find a place for her that evening but he could find some place for her by noon the next day. At around 7:00 o'clock or 8:00 o'clock p.m., Sue became angry with them and told them she would get

even and they would pay for this (V III p 380-382). Sue also testified she was mad at Charlie for using bad language and talking to her on the tape and calling her names (V II p 256).

Thereafter, petitioner went to his shop to work, and Anthony Rucker came by to get some money that was owed. Petitioner told Rucker to return later for his money. Rucker had beer with him and left it with petitioner who drank the beer (V III p 384-385).

Later, petitioner's wife returned and petitioner asked her to listen to the tape which petitioner asserted would prove Sue had been lying about going to bed with him. Petitioner's wife refused to listen (V III p 317-319).

After Eleanor left, the petitioner, Gary, and Sue were sitting in the apartment, and Gary offered Charlie a drink of whiskey, and they started drinking. Rucker returned, and Sue made a pass at him and she and Rucker went into the bedroom. Petitioner denied forcing Sue to go and says that Sue went willingly (V III p 388-389).

Buck Johnson came by the apartment at approximately 1:30 a.m. Buck Johnson was drunk. Sue went and sat on the arm of his chair. All of the people present encouraged Sue's advances and egged Buck on although no threats of death or physical injury were made. Petitioner admitted to being drunk at this time. Petitioner testified Sue and Buck were both drinking and they went into the bedroom later (V III p 390-395).

When Johnson entered the apartment, the second part of the tape recording started. Petitioner denied recording the voices which commenced when Johnson came into the apartment. Sue knew how to operate the tape recorder (V

III p 390-393). Although Sue denied turning the tape recorder on, the evidence reveals she was the only one close enough to the tape recorder to have turned it on when Johnson came into the room (V II p 266-269).

The voices of petitioner, his son, Gary Blevins, and Buck Johnson appear on the tape (V II p 208, 218, 220). The tape was never transcribed, but parts of the tape appear at V II p 208-224.

Two women came by the apartment at approximately 3:30 a.m. and stated that petitioner was outside of the apartment with Gary Blevins. They looked through the window into the apartment and saw a girl laughing and running around with no clothes on. They saw nothing which indicated Sue was being forced to stay in the apartment, and if Sue had called for help, then they would have called the police (V III p 347-350, 352-354).

Another woman came by the apartment at approximately 4:30 a.m. and noted that Sue was on the couch covered with a bedspread which she took off and walked around the apartment naked. This person saw nothing to indicate Sue was being kept against her will. Sue admitted at that time that she was drunk (V III p 355-358).

The next morning, Sue's sister by adoption came to the apartment where Sue and Gary lived (V I p 107-108). Then a sister-in-law by adoption also came to the apartment that morning and talked to Sue's husband, Gary, who gave the sister-in-law the tape recording (V I p 123-126, 131). Sue's brother by adoption listened to the tape recording at his home and later took Sue to the bus station and put her on the bus for Ohio, where Sue's mother lived (V I p 127, 139). Sue never mentioned to her sister-in-law that she had been

raped the previous evening (V I p 129). Sue never mentioned to her brother by adoption that she had been raped (V I p 136).

At trial, Sue testified she engaged in these sexual activities because she was afraid of petitioner (V II p 279). However, she positively stated petitioner never threatened to kill her (V II p 277). Sue was asked if petitioner ever threatened her with immediate physical injury, and Sue replied the only thing she remembers was that he hit her and "liked" to broke her thumb earlier in the afternoon when Eleanor had been present (V II p 279).

Before trial, the petitioner, being unsure as to how he could be guilty of raping a woman with whom he did not have sex, filed motions to require the respondent to state the theory upon which the prosecution was proceeding under the complicity statute, Ky. Rev. Stat. §502.020(1)(a), (b); i.e., either by aiding and assisting or by conspiracy (R 8-11). The Commonwealth replied petitioner's guilt was "by being an aider and abettor to Buck Johnson and Anthony Rucker in the rape of Sue Blevins" (R 17). At a pretrial hearing, petitioner's attorney inquired as to whether the Commonwealth was proceeding under a conspiracy theory (PT p 14), and the Commonwealth represented that no conspiracy was involved (PT p 15). This representation was embodied in an order stating, "[I]t is agreed that Charlie King's accountability, if any, is solely founded on the theory of aiding as defined in KRS 502.020(1)(b)" (R 14).

At trial in an *in camera* hearing, petitioner informed the court he intended to offer proof concerning prior sexual conduct of Sue Blevins. The trial court was informed that Sue Blevins, an adopted girl, had engaged in sexual con-

duct with her father which amounted to touching and fondling but not genital sex, and this occurred at the age of thirteen. Also, the court was informed Sue Blevins had engaged in genital sex with the husband of Sue's sister, causing the break-up of the sister's marriage. Aside from the incident of prostitution charged in the indictment, the court was told of evidence that Sue's mother along with her aunt would dress her up and take her to bars in order to act as bait to attract men so the mother and aunt could engage in prostitution activities (V I p 4-7). An avowal was made as to this proferred evidence (V I p 19, V II p 290-295).

The trial court was informed that although this evidence was not admissible *per se* under the Kentucky Rape Shield Statute, the petitioner should be allowed to introduce the subject because of his right of confrontation, and the court was specifically referred to the case of *Davis* v. *Alaska*, 415 U.S. 308 (1974) (V I p 8).

Also, in an *in camera* hearing, petitioner objected to the introduction into evidence of the tape recording of conversations prior to the alleged rape. It was pointed out to the trial court that aside from the fact the verbal statements on the tape were obscene and inflammatory to the prejudice of petitioner, voices of other persons, the most prejudicial of which was Gary Blevins' voice, appeared on the tape and petitioner could not cross-examine a tape recording. Hence, the playing of the tape recording violated the petitioner's constitutional right to cross-examine witnesses against him (V I p 43-49).

During the *voir dire* and on other occasions, the prosecutor referred to Sue as being mentally retarded and this was objected to because there was not and would not be any evidence of retardation and because there would not

be any attempt to base Sue's lack of consent on lack of mental capacity. The objections were overruled (V I p 25-26, V IV p 468, 470).

Thereafter, evidence was received. One witness was a policeman who stated he met with Sue's relatives on Monday, February 25, 1980, and was given the tape of the alleged rape (V II p 141-142). On the same day the same policeman took a taped statement from the petitioner at the police station (V II p 143). The policeman was allowed to play for the jury the tape of petitioner's statement to the police (V II p 143-145).

The petitioner's statement given to the police and played at the request of the Commonwealth notes that Sue had had psychological problems (V II p 149), that Sue had admitted that her aunt and mother had been prostitutes (V II p 150), and that Sue was promiscuous (V II p 152). The petitioner admitted Sue probably had engaged in sexual intercourse with Buck Johnson and Anthony Rucker on the evening in question and she may have had sex with others on the same night (V II p 162-167).

Thereafter, the trial court over objection allowed the tape recording to be played of petitioner's afternoon conversation with Sue, and of statements made by petitioner, Gary Blevins, Buck Johnson, and others prior to the alleged rape (V II p 178-181). The Commonwealth did not attempt to produce in court the persons whose voices appeared on the tape. There was some indication that Buck Johnson and Anthony Rucker, if summoned to testify, would avail themselves of their fifth amendment privileges not to incriminate themselves (V II p 182). However, Gary Blevins was not called and had been tried for this offense previous to petitioner's trial. At his trial, Gary Blevins

took the stand and testified at length in his own behalf (Supplemental Record on appeal).

After the tape of the alleged rape was played by the policeman, the Commonwealth played the tape a second time for Sue Blevins on the pretext of allowing Sue to identify the voices of those present. This was objected to on the grounds previously stated and because it was repetitive. The court overruled the objection and allowed a continuing objection to the playing of the tape for the grounds stated (V II p 207-208).

After the direct testimony of Sue Blevins, petitioner requested the court to be allowed to cross-examine Sue concerning her prior prostitution activities for the reasons previously stated and because the Commonwealth had itself introduced the matter into evidence by the playing of the taped statement of petitioner wherein petitioner noted Sue's prior sexual problems. The trial court instructed petitioner's attorney not to mention the matter (V II p 231).

The tape recording of the alleged rape was played a third time during petitioner's testimony so petitioner could listen to the tape in front of the jury, and this was objected to (V III p 427-428).

The Commonwealth played the tape of the alleged rape a fourth time during its closing argument over the continuing objection of petitioner (V IV p 478).

In its written instructions to the jury, the trial court violated its own order that Charles King's accountability would be founded solely on the theory of aiding. The trial court instructed the jury that petitioner would be guilty of first degree rape if Gary Blevins used forcible compulsion to make Sue Blevins engage in intercourse with Buck

Johnson and if petitioner aided, counseled or attempted to aid Gary Blevins in making Sue Blevins engage in said sexual intercourse (R 45).

At the time the alleged offense took place, a Kentucky Rule of Criminal Procedure, RCr 9.62, was in effect and provided that the testimony of an accomplice would not be sufficient to convict unless the testimony was corroborated. Ky. Rev. Stat. Ann. RCr 9.62 (Bobbs-Merrill 1972) (Abolished Sept. 1, 1980). At the time of trial, the rule requiring corroboration of accomplice testimony had been abolished. The trial court refused to give petitioner's requested instruction requiring corroboration of the testimony of the admitted accomplice, Kim Christianson (V III p 440).

The jury received the case at 9:05 p.m. on September 30, 1980, and deliberated until 1:00 a.m. the following morning at which time the jury went into recess (V IV p 480-484). At 10:00 o'clock a.m. October 1, 1980, the jury again retired and resumed deliberations. At that point in time, petitioner's attorney informed the court that the tape of the alleged rape had been taken to the jury room without knowledge of petitioner's attorney and objection was lodged of record. The record reflects the jury was furnished with a cassette tape recorder which initially was battery powered, and during the deliberations the jury wore out the batteries on the tape recorder listening to the tape and had to be furnished with an extension cord to allow the tape recorder to operate directly off of electric current. Petitioner requested the swearing of the jury be set aside and a mistrial declared. The motions were overruled (V IV p 485-486).

The jury deliberated until 3:09 p.m. on the afternoon of October 1, 1980, at which time they returned and found the petitioner guilty of rape in the first degree involving Buck Johnson and of promoting prostitution (V IV p 489-492). It is notable that the jury acquitted petitioner on the rape based on Anthony Rucker's conduct when Anthony Rucker's voice did not appear on the tape.

In the appeal, styled, *King* v. *Commonwealth*, No. 81-CA-742-MR (Ky. Ct. App. Dec. 23, 1981) [Hereinafter cited as *King* v. *Commonwealth*], petitioner claimed the use of the tape of the alleged rape violated his constitutional rights of confrontation under the United States Constitution because the tape recording of voices of out-of-court declarants were used to prove his guilt, and petitioner could not confront those persons whose voices appeared on the tape. Moreover, petitioner noted Gary Blevins had testified in his own trial previous to that of the petitioner and, hence, was available even though no attempt was made to produce him. Brief for Appellant at 14-15, Reply Brief for Appellant at 2, *King* v. *Commonwealth*. Further, petitioner argued that regardless of the effect of Kentucky's Rape Shield Law, he should have been permitted to introduce evidence of Sue's prior sexual conduct to show her true motive to damage petitioner, to show her bias, and to show the jury she was not an innocent young girl but instead was sexual manipulator, well-versed in prostitution. Moreover, petitioner argued before the Court of Appeals of Kentucky that the Commonwealth had itself injected the matter into evidence by playing petitioner's recorded statement in which he told the police of Sue's prior prostitution activities. The petitioner informed the Court of Appeals of Kentucky that these rights were guaranteed to him by the Sixth Amendment of the United

States Constitution and by this Court's opinion in *Davis* v. *Alaska*, 415 U.S. 308 (1974). Brief for Appellant at 18-19.

Petitioner argued before the Court of Appeals of Kentucky that to refuse him the benefit of the accomplice instruction required by Kentucky law at the time the alleged crime was committed but which was repealed before the trial was an *ex post facto* violation and, hence, unconstitutional. Reply Brief for Appellant at 3.

Petitioner also argued the repetitive playing of the tape of the alleged rape was erroneous and prejudicial (Brief for Appellant at 16), that it was erroneous to allow the tape to be played repeatedly in the jury room (*Id.* at 16-17), and that it was error for the court to violate its own order and instruct the jury that petitioner was responsible for Gary Blevins' conduct when the order had stated that petitioner was accountable solely as an aider to Buck Johnson (*Id.* at 19-21).

In an unpublished opinion, the Court of Appeals of Kentucky stated, "It is our opinion that there was sufficient evidence to sustain the rape conviction even in the absence of the tape." *King* v. *Commonwealth* at 3.

No mention is made in the opinion of the Court of Appeals of Kentucky concerning petitioner's argument that the admission of the tape recording into evidence violated petitioner's right to confront witnesses, a federal constitutional right.

As concerns the federal confrontation question raised by the application of the "Rape Shield Law," the Court of Appeals of Kentucky stated,

> It is our opinion that it does not violate the United States Constitution or the Constitution of Kentucky. *Smith* v. *Commonwealth*, Ky. App., 566 S.W.2d 181 (1978). Even assuming that there was error in excluding the evidence which appellant sought to introduce as to Sue's prior sexual conduct, we are of the opinion that it could not have been prejudicial to the appellant's case, in view of the fact that there was already evidence throughout the record that Sue was engaging in prostitution. *King* v. *Commonwealth* at 5.

The Court of Appeals of Kentucky did not find that the trial court violated its own order concerning the theory on which petitioner was to be held accountable, rather, it stated there was no error because the Commonwealth had said in a response to a discovery motion that the Commonwealth intended to prove that Gary Blevins threatened the use of force. *King* v. *Commonwealth* at 6.

The Court of Appeals of Kentucky did not address the *ex post facto* argument concerning the corroboration of accomplice testimony instruction and did not discuss the repetitive playing of the tape recording during trial or the taking of the tape recording to the jury room.

Petitioner sought a discretionary review of his case before the Supreme Court of Kentucky and was denied same. Appendix A at 14a.

An order of the Court of Appeals of Kentucky has been entered staying the execution of sentence in order to allow petitioner to seek a writ of certiorari from this Court. Appendix A at 15a.

REASONS FOR GRANTING THE WRIT

I. THE ACTIONS OF THE KENTUCKY TRIAL AND APPELLATE COURTS IN ALLOWING THE PROSECUTION'S USE OF TAPED CONVERSATIONS OF CO-DEFENDANTS AND OF ONE OTHER PERSON WITHOUT PRODUCING THE DECLARANTS FOR CROSS-EXAMINATION ARE IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND PRESENT AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE DECIDED BY THIS COURT.

Persons whose voices appeared on the tape of the events prior to the alleged rape were available to testify at trial. Of the voices appearing on the tape, other than petitioner's voice, the voice of Gary Blevins was especially damaging to the petitioner because of its lurid content and because of the instructions given to the jury. *See* Instruction No. 4, Instructions to Jury, Appendix C at 17c. The instructions informed the jury to find the petitioner guilty if he aided Gary Blevins in using forcible compulsion on Sue and in doing so provided Buck Johnson with the means to have sexual intercourse with the victim. *Id.* Gary Blevins was available to testify because his trial had taken place before petitioner's trial, and he had taken the stand and testified in his own defense. The Commonwealth made no attempt to produce Gary Blevins.

Accordingly, the instant case falls squarely within the rationale of *Barber* v. *Page*, 390 U.S. 719 (1968), where this court held that when there is no prosecutorial showing of unavailability of the declarant whose out-of-court statements are sought to be introduced, then the introduction of the out-of-court statements violates the confrontation requirements of the Sixth Amendment.

Also, the voice of petitioner's son appears on the same tape recording, and there was no prosecutorial attempt to show that petitioner's son was unavailable.

This Court has long held the use of out-of-court statements as substantive evidence of guilt without affording cross-examination of out-of-court declarants raises important and substantial federal questions in regard to the confrontation clause of the U. S. Const. amend. VI. *See Pointer* v. *Texas*, 380 U.S. 400 (1965), *Douglas* v. *Alabama*, 380 U.S. 415 (1965), and *Bruton* v. *United States*, 391 U.S. 123 (1968).

This Court has long recognized the confrontation clause reflects a preference for actual face-to-face confrontation at trial. *Ohio* v. *Roberts*, 448 U.S. 56, 63 (1980), *California* v. *Green*, 399 U.S. 149, 157 (1970). The right of cross-examination is one of the primary interests secured by the confrontation clause. *Douglas* v. *Alabama*, *supra*.

Even if it could be argued in good faith, which it cannot, that the testimony of the out-of-court declarants was admissible as an exception to the hearsay rule, the Commonwealth never attempted to meet the exception by showing unavailability of Gary Blevins and petitioner's son. In *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980), this Court stated, "In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant."

Even if the out-of-court statements were shown to be made by unavailable declarants, the statements would not by definition conform with the constitutional requirements

embodied in the confrontation amendment. "[I]ndeed, we have more than once found violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." *California* v. *Green*, 399 U.S. 149, 155-156 (1970).

In this regard it should be noted that while there is no question that the statements on the tape were made, there are large questions concerning the reliability of what the import or intent of the statements was. The statements consist of drunken remarks and obscenities, commenting upon Sue's promiscuous tendencies. Whether or not the remarks were intended to force Sue to engage in non-consensual intercourse can only be determined by cross-examining the declarants and asking them what the remarks meant.

The respondent might seize upon dicta in *Dutton* v. *Evans*, 400 U.S. 74, 88 n. 19, 96 n. 3 (1970), for the proposition that petitioner should have called Gary Blevins and petitioner's son as witnesses.

There are two reasons why this is not so.

First, there was an important tactical reason not to call Gary Blevins as a witness. In reliance upon the Commonwealth's agreement that petitioner's accountability was as an aider or abettor to Buck Johnson, Gary Blevins' testimony would have been immaterial to petitioner's liability. Before the trial court erroneously instructed the jury, petitioner expected to use the argument that regardless of whether or not Gary Blevins forced his wife to engage in intercourse with Buck Johnson, the petitioner did not use such force.

Second, the fact remains that the burden to produce witnesses is on the state when faced with the right to confrontation. The fact that petitioner could call out-of-court declarants is not a substitute. On cross-examination the petitioner would have greater freedom in questioning witnesses; i.e., the right to use leading questions, and the prosecution could have impeached Gary Blevins had he been a witness for petitioner. *See Park* v. *Huff*, 493 F.2d 923, 934 (5th Cir. 1974), *rev'd on other grounds en banc*, 506 F.2d 849, *cert. denied*, 423 U.S. 824 (1975).

> [T]hat when an extrajudicial declaration is used under circumstances such that opportunity to cross-examine the declarant is essential to a defendant's right of confrontation, it must be the government's burden to produce the declarant. Mere availability, in the sense that the defendant could have subpoenaed him, does not, in our opinion, suffice. *Simmons* v. *United States*, 440 F.2d 890, 891 (7th Cir. 1971), *See also Hoover* v. *Beto*, 439 F.2d 913, 939 (5th Cir.) *rev'd on other grounds en banc*, 467 F.2d 516, *cert. denied*, 409 U.S. 1086 (1971).

The Kentucky appellate court in essence ruled the admission and use of the tape recording of conversations prior to the alleged rape constituted harmless error. With due respect, this is not true.

The harmless error finding below was contrary to this Court's prior holdings that the denial of cross-examination is a constitutional error of the first magnitude and no showing of want of prejudice could cure it. *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1966), *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968), *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974).

Aside from the tape recording in question, there was little, if any, evidence of petitioner's guilt. Even the supposed victim testified petitioner not only did not have intercourse with her, but petitioner never threatened her with death or with immediate physical injury. The tape itself was highly prejudicial, being so vulgar that it could not help but inflame the sensibilities of any average juror. The Commonwealth thought so much of the potency of this piece of evidence that it played the tape four times during the trial and then managed to give the jury a battery-operated tape recorder in order to listen to the tape. The jury exhausted the batteries of the tape recorder while listening to the tape and requested and received an extension cord to listen further to the tape.

Petitioner was convicted because of the playing of an obscene and pornographic sound track. The appellate court could not in good conscience believe beyond a reasonable doubt that the constitutional error complained of did not contribute to the result. As a matter of fact, the "harmless error" standard used by the appellate court is contrary to this Court's holding in *Chapman* v. *State of California*, 386 U.S. 18, 24 (1967). *King* v. *Commonwealth* at 3.

Additionally, this case presents unique, federal questions upon which this Court should rule.

A thread running through all of this Court's decisions in confrontation cases is the conflict and interplay between the confrontation clause and the hearsay rule. The two are not identical.

> It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court

has never equated the two, and we decline to do so now. *Dutton* v. *Evans*, 400 U.S. 74, 86 (1970).

Admitting the difficulty, this Court has resolved to meet the problem in the following manner: "True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions." *Ohio* v. *Roberts*, 448 U.S. 56, 64 (1980).

The tape of conversations prior to the alleged rape does not fit into an evidentiary niche. It has characteristics of documentary evidence and of implied assertions bearing on the ultimate issues presented. This type of evidence has never been put to the test of the confrontation clause, and the instant case presents the opportunity to do so. The modern proliferation of sound and video recording devices suggests that this type of "evidence" will appear in trials on an increasingly frequent basis.

In testing the admissibility of the out-of-court statements of unavailable declarants, this Court has been concerned with whether the statement has indicia of reliability, typically as to whether the statement was introduced exactly as uttered by the out-of-court declarant. But in the instant case there is no doubt the words were spoken. Even so, the reliability of what the words meant or intended is highly doubtful without the declarants being available for cross-examination. The writ requested should be granted so as to formulate reliability standards for implied assertions of guilt in situations where the text of the statement is known but the meaning is not.

II. THE APPLICATION OF KY. REV. STAT. § 510.145, "THE RAPE SHIELD LAW," WHICH PROHIBITED PETITIONER FROM CROSS-EXAMINATION TO SHOW BIAS, MOTIVE AND IMPEACH CREDIBILITY RAISES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, IN THAT IT DENIED PETITIONER HIS RIGHT TO CONFRONTATION.

Petitioner was prevented from inquiring into the past sexual conduct of the victim because the Kentucky "Rape Shield Law" prevented admission of such evidence at trial. The Court of Appeals of Kentucky when confronted with petitioner's objection to the application of the "Rape Shield Law", stated merely that the statute [Ky. Rev. Stat. Ann. §510.145 (Bobbs-Merrill Supp. 1980) (Effective June 19, 1980)], "does not violate the United States Constitution or the Constitution of Kentucky." *King* v. *Commonwealth* at 5.

Petitioner proposed to use evidence of past sexual conduct as support for his theory of the case. "The inference in this case exists that Sue Blevins was a sexual manipulator, well-versed in prostitution, who in the past had used sex in a manner destructive to familial relationships." Brief for Appellant at 18. This evidence along with the victim's admission that she wanted to hurt the petitioner and his wife demonstrate bias and a motive to fabricate the charge of non-consensual sexual intercourse. Indeed, this prior sexual history demonstrates a habit on the part of the victim to use sex in a manipulative or vengeful manner toward people closest to her personal life. It was evidence of a distinctive pattern of conduct, closely resembling the petitioner's version of the encounter, to prove more than just consent. This evidence, when coupled with Sue Blevins'

statements to Eleanor King as to Charles King's sexual activities with her cast shadows on the alleged victim's credibility that the jury should be allowed to hear.

In an analogous case, *Davis* v. *Alaska*, 415 U.S. 308 (1974), this Court held that the state's interest in a Juvenile Shield Law must yield to the accused's Sixth Amendment Right to Confrontation through cross-examination. Petitioner relies heavily on *Davis* for support of this petition.

The right to cross-examine is a primary interest secured by the Confrontation Clause of the U.S. Const. amend. VI. *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965). "Cross-examination is the principal means by which believability of a witness and the truth of his testimony are tested." *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). To petitioner's knowledge this Court has not decided the question of how far a state can go in restricting a defendant's right to confrontation by application of a Rape Shield Statute. As at least forty-six (46) jurisdictions have enacted such legislation [Tanford & Bocchino, *Rape Victim Shield Laws and The Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980)] this potential encroachment on the Right to Confrontation is an important question which should be decided by this Court.

Should not the petitioner have been allowed to explain his knowledge of Sue's past history of prostitution when he was charged with promoting her prostitution? Did the jury feel it likely that petitioner would participate in Sue's "rape" when the petitioner's statement showed he knew Sue to be a common prostitute? When petitioner's position at trial was that Sue willingly engaged in sex and brought these charges with the motive to harm petitioner, his wife

and Gary Blevins, would petitioner's version be more credible if the jury had known of Sue's past, destructive machinations? The answers to these inquiries are affirmative, and this is precisely why petitioner should have been allowed to confront his accusers.

The Court of Appeals of Kentucky suggested that even if there was error in excluding evidence under Ky. Rev. Stat. §510.145, it was harmless error because the evidence showed Sue to be a prostitute. *King* v. *Commonwealth* at 5. The appellate court missed the point because the evidence was not offered to prove Sue to be a prostitute.

Even so, denial of the effective right to cross-examine, "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart* v. *Janis*, 381 U.S. 1, 3 (1966), *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968), *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974).

III. THE FAILURE TO GIVE PETITIONER'S REQUESTED CORROBORATION INSTRUCTION PURSUANT TO RCr 9.62 VIOLATED THE PROHIBITION AGAINST EX POST FACTO LAWS IN ARTICLE I OF THE UNITED STATES CONSTITUTION WHICH RAISES AN IMPORTANT FEDERAL QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

The rules of criminal procedure in effect at the time of the alleged criminal act [Promoting Prostitution in the Second Degree, Ky. Rev. Stat. Ann. §529.040 (Bobbs-Merrill 1975), *See* Indictment, Appendix C at 1c] required that the testimony of an accomplice would not support a conviction unless corroborated. *See* Ky. Rev. Stat. Ann. RCr 9.62 (Bobbs-Merrill 1972) (Abolished Sept. 1,

1980). That rule of criminal procedure was abolished on September 1, 1980, approximately one month before petitioner's trial. Petitioner's requested corroboration instruction should have been given because to refuse the instruction is to give the repeal of the rule of criminal procedure a retroactive effect. That failure to give the requested corroboration instruction violates the *ex post facto* clause of the United States Constitution. U.S. Const. art. I, § 10, cl. 1.

Almost the precise question was dealt with in *Government of Virgin Islands* v. *Civil*, 591 F.2d 255 (3rd Cir. 1979) where it was held that a defendant was entitled to the benefit of the corroboration statute, even though repealed after the crime occurred, because to do otherwise would violate the *ex post facto* doctrine of the United States Constitution. Indeed, the Supreme Court of Kentucky's decision in *Commonwealth* v. *Brown*, 619 S.W.2d 699, 703 (Ky. 1981), which was rendered after the petitioner's conviction in the trial court but before the appeal was decided is *exactly* on point and would require the requested instruction be given.

The Commonwealth argued there was no *ex post facto* violation, citing this court's opinion in *Dobbert* v. *Florida*, 432 U.S. 282 (1977), because the change was one of procedure rather than of substance. Brief for Appellee at 17.

The Court of Appeals of Kentucky avoids the issue by stating the testimony of the accomplice, Kim, was corroborated by Sue, and, hence, no error. *King* v. *Commonwealth* at 6. This is incorrect because Ky. Rev. Stat. §529.060 required Sue's testimony to be corroborated, and RCr 9.62 required Kim's testimony to be corroborated further. In other words, double corroboration was required,

and it was not present. Please note that Gene Ross, the other person present, said petitioner was not involved.

The failure of the Kentucky appellate court to consider an important question of federal constitutional law emphasizes the need of the United States Supreme Court to put this question to rest and prevent any further violations of the prohibition against *ex post facto* laws in U.S. Const. art. I, § 10, cl. 1.

IV. THE TRIAL AND APPELLATE PROCEEDINGS WERE TAINTED BY A SERIES OF PREJUDICIAL ERRORS THAT WHEN TAKEN INDIVIDUALLY OR AS A WHOLE, RENDERED THE CONVICTION SO FUNDAMENTALLY UNFAIR AND IN DIRECT CONFLICT WITH A DECISION OF THIS COURT THAT IT DENIED THE PETITIONER DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Not only did the trial and appellate courts ignore the United States Constitution and the decisions of this Court, they even ignored their own decisions, the most flagrant example of this being the refusal to acknowledge *Commonwealth* v. *Brown*, 619 S.W.2d 699 (Ky. 1981) as being dispositive of the argument that the refusal to give the accomplice instruction was an *ex post facto* violation. It is elementary that a citizen may rely upon the courts to follow their own decisions.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations." *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973). The actions of the trial and appellate courts of Kentucky denied petitioner the fair opportunity mentioned.

Although the admission of the tape of the events prior to the alleged rape was erroneous, the use of the tape was unjust and unfair and constituted a denial of due process of law. Not only was the tape played before the jury four times, but the tape was taken to the jury room, over petitioner's objection, and played for hours by the jury. This is violative of the common law of the Commonwealth of Kentucky. *See Williams* v. *Watson*, 268 S.W. 1067, 1069 (Ky. 1925). The tape was highly inflammatory due to the language used on the tape and the subject matter of the tape. The use of the tape was and is offensive to traditional notions of justice and fair play during the conduct of a criminal trial.

Petitioner has made clear his constitutional objections to the court's prohibition of cross-examination concerning Sue's past conduct but in addition to those constitutional objections is the assertion that it is unjust and a denial of due process to allow the Commonwealth to introduce evidence concerning Sue's past conduct via the petitioner's statement given to the police and then refusing the petitioner the right to cross-examine and introduce evidence concerning matters placed before the jury by the adversary party, Commonwealth of Kentucky.

In the same regard, it is unfair for the courts and the prosecution to keep from the jury the true facts concerning Sue's history and probable motivation concerning the events in question and at the same time state to the jury as a fact that Sue was mentally retarded. The only purpose in doing so was the Commonwealth's object of inflaming the jury by implying that Sue was retarded. There was no legitimate purpose in doing so because there was no evidence of retardation and no claim of a lack of consent based on retardation.

Perhaps most important in the denial of justice was the fact that the trial court changed the rules of the game after the game had been played. The agreed order stated that petitioner's guilt could only be had on a showing of aiding and assisting the persons who had sex. It was expressly represented before trial that criminal liability would not attach because of a conspiracy between those present to force Sue to have sex against her will. However, after all of the evidence was taken and after the petitioner testified, the trial court in its instructions changed the rules and stated that petitioner would be guilty if Gary Blevins forced Sue to have intercourse with Buck Johnson and if petitioner assisted Gary Blevins. It is a denial of fundamental fairness for a trial court to refuse to uphold its own orders. It is a denial of fundamental fairness to promise the petitioner that he is not guilty because of a conspiracy and then to convict him because he conspired with Gary Blevins to force Sue to have sex with Buck Johnson.

In the same vein it denies due process for the appellate court to refuse to consider errors denounced by its common law and denounced by the United States Constitution and the decisions of this Court.

The facts of this case reveal that petitioner was denied a trial and an appeal in accord with traditional and fundamental standards of due process and of fair play. This is a serious miscarriage of justice encroaching upon a citizen's federal rights under the United States Constitution that this Court should address.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals of Kentucky in *King* v. *Commonwealth*, No. 81-CA-742-MR (Ky. Ct. App. Dec. 23, 1981).

Respectfully submitted,

ROBERT LESLIE ROSENBAUM, ESQ.
ROSENBAUM & ROSENBAUM
Suite 300, The Lexington Building
201 West Short Street
Lexington, Kentucky 40507
(606) 259-1321

APPENDIX A

OPINIONS BELOW

Commonwealth v. *King*, No. 80-CR-412 (Fayette Cir. Ct. Nov. 18, 1980) 1a-4a

King v. *Commonwealth*, No. 81-CA-742-MR (Ky. Ct. App. Dec. 23, 1981) 5a-12a

King v. *Commonwealth*, No. 81-CA-742-MR (Ky. Ct. App. Feb. 26, 1982) (Order Denying Petition For Rehearing) 13a

King v. *Commonwealth*, No. 82-SC-215-D (Ky. May 18, 1982) (Order Denying Discretionary Review) 14a

King v. *Commonwealth*, No. 81-CA-742-MR (Ky. Ct. App. May 21, 1982) (Order Granting Ninety Day Stay Of Execution) ... 15a

NOV 18 1980

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
SECOND DIVISION

COMMONWEALTH OF KENTUCKY, PLAINTIFF

CHARLIE KING DEFENDANT

FINAL JUDGMENT

SENTENCE OF IMPRISONMENT

INDICTMENT NO. 80CR-412-2

CHARGE: Ct.2: Rape 1st Degree
Ct.3: Promoting Prostitution 2nd Degree

* *

The defendant having entered a plea of not guilty, and on the 1st day of October, 1980, a jury having returned a verdict that the defendant was guilty of the crime of Ct.2 - Rape 1st Degree, Ct.3 - Promoting Prostitution 2nd Degree and fixed his punishment at fourteen (14) years under Ct.2 and one (1) year under Ct.3,

On this 14th day of November, 1980, the defendant, Charlie King, appeared in open Court with his attorney, Hon. Leslie Rosenbaum, and the Court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel and opportunity to make statements in the defendant's behalf and to present any information in

mitigation of punishment, and the Court informed the defendant and his counsel of the factual contents and conclusions contained in the written report of the presentence investigation prepared by the Division of Probation and Parole, and the defendant having failed to request time within which to controvert the factual contents contained in said report, and the Court having given due consideration to the report prepared by the Division of Probation and Parole, and the defendant having been given time within which to controvert the factual contents contained in said report, and the Court having given due consideration to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the Court is of the opinion that imprisonment is necessary for the protection of the public because there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge; the defendant is in need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution; probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime; due to the defendant's prior criminal record; due to the violent nature of the defendant's crime and due to the deliberate nature of the defendant's crime.

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the defendant, and it is therefore ORDERED AND ADJUDGED BY THE

COURT that the defendant is guilty of the crime of Ct.2 - Rape 1st Degree, Ct.3 - Promoting Prostitution 2nd Degree and his sentence is hereby fixed at a maximum term of fourteen (14) years under Ct.2 and one (1) year under Ct.3 in the State Penitentiary at hard labor; and

IT IS FURTHER ORDERED that the Sheriff of Fayette County shall deliver the defendant to the custody of the Department of Corrections hereunder at such location within this state as the Department shall designate.

IT IS FURTHER ORDERED that the defendant is hereby credited with time spent in custody prior to the commencement of sentence, namely, 12 days, towards service of the maximum term of imprisonment.

After imposing sentence, the Court informed the defendant that he has a right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, that if he were financially unable to afford an appeal, a record would be prepared for him at public expense and counsel would be appointed to represent him, that an appeal must be taken within ten days of the date of this judgment and that the Clerk of the Court would prepare and file a notice of appeal on his behalf within that time if he so requests. Pending appeal the defendant is remanded to custody.

It is further ORDERED BY THE COURT that the defendant's appeal bond is set at $15,000.00 full cash or may be allowed to post a property bond.

It is further ORDERED that the sentence of fourteen (14) years under Ct.2 shall run consecutively with the sentence of one (1) year under Ct.3 and that the total sentence shall run consecutively with any other previous sentence the defendant has received.

/s/ N. Mitchell Meade
JUDGE, FAYETTE CIRCUIT COURT

NOTICE

The foregoing Judgment was entered on the 18 day of October, 1980.

Robert M. True, C.F.C.C.
BY: /s/ E. Armstrong D.C.

The foregoing Judgment and notice of entry was served upon the defendant by mailing a true copy to the Hon. Leslie Rosenbaum, attorney of record, postage pre-paid, this 18 day of October, 1980.

BY: /s/ E. Armstrong D.C.

* * * * * * *

OPINION RENDERED: December 23, 1981; 2:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 81-CA-742-MR

CHARLES KING APPELLANT

v.

APPEAL FROM
FAYETTE CIRCUIT COURT
HONORABLE N. MITCHELL MEADE, JUDGE
ACTION NO. 80-CR-412

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING

* * * * * * * * * * * *

BEFORE: GUDGEL, HOGGE and LESTER, Judges.

HOGGE, JUDGE. Charles King appeals from a judgment of the Fayette Circuit Court based on a jury verdict finding King guilty of rape in the first degree and promoting prostitution in the second degree. The prosecuting witness in the case was a 17 year old married woman by the name of Sue Blevins, and the events took place in February, 1980. King, Gary Blevins and Buck Johnson were charged with rape by making Sue Blevins engage in sexual intercourse with Buck Jones [*sic*] by forcible compulsion. King was con-

victed as to this charge. (The jury returned a "not guilty" verdict as to a second count involving compelled sexual intercourse with Anthony Rucker). King was also found guilty of advancing prostitution activity as a result of an incident in which Mrs. Blevins had sexual intercourse with Gene Ross for a cash payment. King contends that numerous errors occurred at the trial, including error involving the instructions and the admission of evidence.

The alleged criminal acts took place at a laundromat building in Lexington. Both Sue Blevins and her husband Gary were employed by King. Gary worked in King's vending machine business and Sue folded laundry in King's laundromat. King, who was forty years of age at the time of trial, was married and had two children. Stevie, age 17 and Cindy, age 16.

The prostitution occurred when Gene Ross came to the laundromat and was approached by a 16 year old girl named Kim Christianson. Kim asked him if he wanted to buy some sex. He inquired as to the price and she said thirty dollars. Ross testified that he laid down three ten-dollar bills and went into the bedroom at her instructions. The lights were off and he had sexual intercourse with a woman who he later discovered was Gary Blevins' wife, Sue.

Kim and Sue testified that Charlie King had asked Kim to act as Sue's pimp. Kim stated that after Gene Ross finished she received $10.00 and Charlie King received $20.00. King denied knowing that any prostitution activity was going on.

Cindy King informed her mother (the appellant's wife) that Sue had gone to bed with Ross for money. Mrs. King was upset and went to the laundromat where she slapped Sue. Sue then told her she had been to bed with the appellant whereupon Mrs. King became angry at her husband.

Later the same day King made a tape recording in which he talked to Sue in an effort to get her to admit on tape that she had lied to Mrs. King. In a second section of the tape, the preliminary part of the alleged rape involving King, Gary Blevins and Buck Johnson, at which appellant's son Stevie was also present, was recorded. The propriety of admitting this tape into evidence is one of the major issues raised in the appellant's brief. We note that there is no indication from the appellant that this tape is not authentic, that it was not accurate, or that there had been any alterations in the tape. It is our opinion that there was sufficient evidence to sustain the rape conviction even in the absence of the tape.

Sue testified that on the evening in question that she was afraid of the defendants, and that specifically, she was afraid of Charlie King. King had hit her hand against the bar and had bruised her thumb, causing it to swell. He had also kicked her. Sue told the investigating officers that Charlie had said she had to be punished for telling his wife on him by going to bed with them, walking around the apartment naked, and cleaning up the apartment and she recalled this in her

testimony. At the time of the incident the men started pushing her and telling her to kiss Johnson "and do all that . . . . go to bed . . . . and I didn't want to do it." Sue was asked whether she had gone to bed with the men because she was afraid of a girl named Kim and her friends, and responded "No, I was afraid of Charlie." She testified that she had had sexual intercourse with Buck Johnson and others that night and that she did not want to do so, but she was scared. There was no chance to escape because "everybody kept coming in every fifteen minutes and I had my clothes off and by the time I put my clothes on and got to the door, they would have probably come in." Leatha Pash talked to King by telephone at 2:30 or 3:00 a.m., and heard Sue scream over the phone. Leatha Pash, and George and Laura Clouse testified that Sue was crying the next morning when they saw her. Her thumb was hurt and in George's words, she was "really tore up" emotionally.

The facts in the preceding paragraph were elicited by counsel apart from the tape introduced into evidence. It is our opinion that the issue as to the admissibility of the tape need not be reached in this opinion, as there was sufficient evidence to sustain the rape conviction even excluding the tape. Even if it could be said that some error occurred in the admission of the tape, any such error would not have been prejudicial since, in view of the quantity of evidence of the appellant's guilt independent of the tape, we can-

not say that upon the whole case there is a substantial possibility that the result would have been any different if the tape had not been introduced. *Niemeyer* v. *Commonwealth*, Ky., 533 S.W.2d 218 (1976).

The next issue raised by the appellant's brief if whether the trial court properly refused to allow the appellant to prove prior sexual conduct of the victim. KRS 510.145 specifically states that "In any prosecution under KRS 510.040 through KRS 510.140, ... reputation evidence, and evidence of specific instances of the complaining witness' prior sexual conduct or habits is not admissible by the defendant." KRS 510.145 is applicable in the case before us. It is our opinion that it does not violate the United States Constitution or the Constitution of Kentucky. *Smith* v. *Commonwealth*, Ky. App., 566 S.W.2d 181 (1978). Even assuming that there was error in excluding the evidence which appellant sought to introduce as to Sue's prior sexual conduct, we are of the opinion that it could not have been prejudicial to the appellant's case, in view of the fact that there was already evidence throughout the record that Sue was engaging in prostitution.

The appellant next contends that the instructions given by the trial court were erroneous. He first asserts that the trial court erred in its instructions four and five in using the appellant's aiding of Gary Blevins in acts of forcible compulsion as part of the basis for a finding of guilt. The appellant contends

that an agreement was reached that the Commonwealth would not rely on Blevins' conduct in proving King's guilt. We find no such agreement in the record. There was simply an agreement that Charles King's accountability would be solely founded on the theory of aiding as defined in KRS 502.020(1)(b). In its "Response to Defendant's Discovery Motion," the Commonwealth said that King was responsible as an aider and abettor to Buck Johnson in the crime of rape, and specifically went on to state that it intended to prove that Gary Blevins threatened the use of force on Sue and had in his possession a nightstick. We find no error.

As to the matter of the indictment, we find that the trial court specifically informed the jury that the indictment had no evidentiary value, and we find no reversible error as to this issue. We further believe that the instructions, taken as a whole, were in substantial compliance with RCr 9.56, and also were proper under the law as to complicity in the crime of rape, and the promotion of prostitution in the second degree. We are of the opinion that no instruction on promoting prostitution in the third degree was required in view of the fact that the only evidence presented was to the effect that King managed the operation or that he was not involved in it at all.

The appellant further contends that the trial court failed to give an instruction requiring corroboration of the testimony of the accomplice, Kim Christianson.

Kim's testimony was corroborated by the testimony of Sue Blevins which, by itself, constituted clear evidence of guilt. It was also corroborated by statements of Gene Ross, which, while they did not directly show involvement by King, tended to connect him with the offense. We find no reversible error in the failure to give a corroboration instruction under the circumstances of this case. *Mishler* v. *Commonwealth*, Ky., 556 S.W.2d 676 (1977).

We have examined other allegations of error raised by the appellant, and we find them to be without merit.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

ATTORNEYS FOR APPELLANT:

C. Randall Raine
Leslie Rosenbaum
Suite 300
The Lexington Building
201 West Short Street
Lexington, Kentucky 40507

ATTORNEYS FOR APPELLEE:

Honorable Steven Beshear
Attorney General
Capitol Building
Frankfort, Kentucky 40601

Virgil Webb
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

* * * * * * *

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 81-CA-742-MR

CHARLES KING **APPELLANT**

v.

COMMONWEALTH OF KENTUCKY **APPELLEE**

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE N. MITCHELL MEADE, JUDGE
CIVIL ACTION NO. 80-CR-412

ORDER DENYING PETITION FOR REHEARING

BEFORE: GUDGEL, HOGGE and LESTER, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: FEBRUARY 26, 1982

/s/ Charles B. Lester
JUDGE, COURT OF APPEALS

* * * * * * * *

SUPREME COURT OF KENTUCKY
82-SC-215-D
(81-CA-742-MR)

CHARLES KING **MOVANT**

V. **FAYETTE CIRCUIT COURT**
80-CR-412

COMMONWEALTH OF KENTUCKY **RESPONDENT**

ORDER DENYING DISCRETIONARY REVIEW

The motion of Charles King for a review of the decision of the Court of Appeals is denied.

ENTERED May 18, 1982.

/s/ John S. Palmore
Chief Justice

* * * * * * * *

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
81-CA-742-MR

CHARLES KING **APPELLANT/MOVANT**

v.

COMMONWEALTH OF KENTUCKY **APPELLEE/RESPONDENT**

ORDER

* * * * * * * * * * *

Pursuant to CR 76.44, a ninety-day stay of execution of the enforcement of the opinion of the Court herein is hereby granted to the appellant/movant, Charles King, in order that he may seek certiorari to the United States Supreme Court.

This twenty-first day of May, 1982.

/s/ Anthony M. Wilhoit
Anthony M. Wilhoit, Judge
Kentucky Court of Appeals

* * * * * * * *

APPENDIX B

STATUTORY PROVISIONS INVOLVED

U.S. Const. art I, §10, cl. 1 ..... 1b

U.S. Const. amend. VI 1b

U.S. Const. amend. XIV, §1 ..... 1b-2b

Liability for conduct of another—Complicity, Ky. Rev. Stat. Ann. §502.020 (Bobbs-Merrill 1975) 2b

Definitions—Forcible Compulsion, Ky. Rev. Stat. Ann. §510.010(2) (Bobbs-Merrill 1975) 3b

Rape in the first degree, Ky. Rev. Stat. Ann. §510.040 (Bobbs-Merrill 1975) 3b

Inadmissibility of evidence of prior sexual conduct or habits of complaining witness—Exception—Procedure for admission, Ky. Rev. Stat. Ann. §510.145 (Bobbs-Merrill Supp. 1980) (Effective June 19, 1976) 3b-4b

Promoting prostitution in the second degree, Ky. Rev. Stat. Ann. §529.040 (Bobbs-Merrill 1975) 4b-5b

Corroboration, Ky. Rev. Stat. Ann. §529.060 (Bobbs-Merrill 1975) 5b

Testimony of accomplice, Ky. Rev. Stat. Ann. RCr. 9.62 (Bobbs-Merrill 1972) (Abolished effective Sept. 1, 1980) 5b-6b

STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, §10, cl. 1:

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ky. Rev. Stat. §502.020: Liability for conduct of another—Complicity—

(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
(b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
(c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.
(2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:
(a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or
(b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or
(c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

Ky. Rev. Stat. §510.010(2): Definitions—Forcible Compulsion

"Forcible compulsion" means physical force that overcomes earnest resistance or a threat, express or implied, that overcomes earnest resistance by placing a person in fear of immediate death or physical injury to himself or another person or in fear that he or another person will be immediately kidnapped.

Ky. Rev. Stat. §510.040: Rape in the first degree

(1) A person is guilty of rape in the first degree when:
(a) He engages in sexual intercourse with another person by forcible compulsion; or
(a) He engages in sexual intercourse with another person who is incapable of consent because he:
1. Is physically helpless; or
2. Is less than twelve (12) years old.
(2) Rape in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony.

Ky. Rev. Stat. §510.145: Inadmissability of evidence of prior sexual conduct or habits of complaining witness—Exception—Procedure for admission—

(1) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to the provisions of this section.

(2) In any prosecution under KRS 510.040 through 510.140, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of these sections, reputation evidence, and evidence of specific instances of the complaining witness' prior sexual conduct or habits is not admissible by the defendant.

(3) Notwithstanding the prohibition contained in subsection (2) of this section, evidence of the complaining witness' prior sexual conduct or habits with the defendant or evidence directly pertaining to the act on which the prosecution is based, may be admitted at the trial if the relevancy of such evidence is determined in the following manner:

(a) A written motion shall be filed by the defendant with the court no later than two (2) days prior to the day of trial, or at such later time as the court may for good cause permit, stating that the defendant has an offer of relevant evidence of prior sexual conduct or habits of the complaining witness.

(b) A hearing on the motion shall be held in the judge's chambers. If, following the hearing, the court determines that the offered proof is relevant and that it is material to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, the court shall admit the offered proof, in whole or in part, in accordance with the applicable rules of evidence.

Ky. Rev. Stat. §529.040: Promoting prostitution in the second degree—

(1) A person is guilty of promoting prostitution in the second degree when he knowingly:
(a) Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two (2) or more prostitutes; or
(b) Advances or profits from prostitution of a person less than eighteen (18) years old.
(2) Promoting prostitution in the second degree is a Class D felony.

Ky. Rev. Stat. §529.060: Corroboration—

(1) No person shall be convicted of prostitution solely on the uncorroborated testimony of a patron.
(2) No person shall be convicted of promoting prostitution solely on the uncorroborated testimony of a person whose prostitution activity he is alleged to have advanced or from whose prostitution activity he is alleged to have profited.

Ky. Rev. Stat. RCr 9.62: Testimony of accomplice—

A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances

thereof. In the absence of corroboration as required by law, the court shall instruct the jury to render a verdict of acquittal.

* * * * * * *

APPENDIX C

MISCELLANEOUS DOCUMENTS

Commonwealth v. *King*, No. 80-CR-412
(Fayette Cir. Ct. Aug. 18, 1980)
(Indictment) 1c-3c

Commonwealth v. *King*, No. 80-CR-412
(Fayette Cir. Ct. Sept. 5, 1980)
Defendant's Motion for Bill of Particulars) . 4c-7c

Commonwealth v. *King*, No. 80-CR-412
(Fayette Cir. Ct. Sept. 15, 1980)
(Response to Defendant's Discovery
Motion) 8c-10c

Commonwealth v. *King*, No. 80-CR-412
(Fayette Cir. Ct. Sept. 8, 1980) (Order) . . . 11c-13c

Commonwealth v. *King*, No. 80-CR-412
(Fayette Cir. Ct. Sept. 30, 1980)
(Instructions to Jury) 14c-21c

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
2nd DIVISION

THE COMMONWEALTH OF KENTUCKY

VS.

ANTHONY V. RUCKER Cts.1 (First Div.)
CHARLIE KING Cts.1,2,3
GARY BLEVINS Ct.1,2
BUCK JOHNSON Ct.2

DIRECT INDICTMENT NO. 80CR412
AUGUST, 1980

COUNTS 1 & 2: RAPE 1ST DEGREE
KRS 510.040
CLASS B FELONY

COUNT 3: PROMOTING PROSTITUTION
IN THE 2ND DEGREE
KRS 529.040
CLASS D FELONY

THE GRAND JURY CHARGES:
COUNT 1:

On or about the 24th day of February, 1980, in Fayette County, Kentucky, the above named Defendant(s), Anthony V. Rucker, Charlie King, and Gary Blevins committed the offense of Rape in the first degree by making Sue Blevins engage in sexual intercourse with Anthony V. Rucker by forcible compulsion;

COUNT 2:

On or about the 24th day of February, 1980, in Fayette County, Kentucky, the above named Defendants, Buck Johnson, Gary Blevins, and Charlie King committed the offense of Rape in the first degree by making Sue Blevins engage in sexual intercourse with Buck Johnson by forcible compulsion;

COUNT 3:

Sometime during the month of February, 1980, in Fayette County, Kentucky, the above named Defendant, Charlie King and a female juvenile committed the offense of Promoting Prostitution in the second degree by promoting and advancing prostitution by providing a place for prostitution and receiving money for prostitution involving a girl less than eighteen years old;

against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL
/s/ C. E. Lindberg
Foreman

GRAND JURY WITNESSES

Det. Hal McKinney
Penny Blevins

A TRUE BILL

Presented by the Foreman of the Grand Jury to the Court, in the presence of the Grand Jury, and received

from the Court by me and filed in open Court this 18th day of August, 1980,

/s/ Robert M. True Clerk
Fayette Circuit Court
BAIL $ No bond til Pre-Trial
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.
ARRAIGNMENT is set for the 22nd day of August, 1980, at 10:00.

Blevins - Rec. on $5,000
Rucker - $5,000.00

* * * * * * * *

SEPT 5 1980

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
SECOND DIVISION

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. MOTIONS INDICTMENT NO. 80-CR-412

CHARLIE KING, ET AL. DEFENDANTS

* * * * * * * * * * * *

The Defendant, Charlie King, makes the following motions:

1. He moves the Court to dismiss counts 1 and 2 of the indictment against him inasmuch as he is charged with rape in the first degree, the offense denounced by KRS 510.040. Counts 1 and 2 should be dismissed because those counts admit that Charlie King did not have sexual intercourse with Sue Blevins, and such is required by the appropriate statute.

Alternatively, Charlie King moves the Court for an order requiring the Commonwealth to inform him of the precise manner in which it is alleged by the Commonwealth that he could be criminally responsible for the acts of Anthony V. Rucker and Buck Johnson in having sexual intercourse with the alleged victim, Sue Blevins.

Alternatively and additionally, Charlie, pursuant to RCr 6.22, moves the Court for a bill of particulars stating the exact manner in which the events alleged in Counts 1 and 2 of the indictment occurred.

2. Pursuant to RCr 6.22, Charlie King moves the Court for a bill of particulars stating the date, time and place the events alleged in Count 3 of the indictment occurred and stating further the precise manner in which the events alleged in Count 3 of the indictment occurred.

3. Pursuant to RCr 6.22, Charlie King moves the Court for a bill of particulars stating the names and addresses of each witness present when the events alleged in all counts of the indictment occurred, stating the exact statements made by Charlie King and/or the persons who were present with Charlie King at the time each of the events alleged in all counts of the indictment occurred, and stating the names and addresses of each person known to the Commonwealth to have information relevant to the alleged events in all counts of the indictment.

4. Charlie King moves the Court for an order requiring the Commonwealth to furnish to him all evidence exculpatory as to him.

5. Charlie King moves the Court for an order requiring the Commonwealth to furnish to him all investigative reports, tapes, notes, or memoranda of police officers and of witnesses concerning the events alleged in all counts of the indictment inasmuch as he

would be entitled to this information after those persons testified at the trial, and this requrest is made in order to prevent delay, confusion, and the possibility of a continuance of the trial of this action. *LeGrande* v. *Commonwealth*, Ky., 494 S.W.2d 726 (1973).

6. Charlie King moves the Court for an order prohibiting any of the parties or their witnesses at the trial of this case for making any mention of or alluding to the fact that the alleged victim, Sue Blevins, may have some type of faulty mental processes. In support of this motion, Charlie King states that the indictment in Counts 1 and 2 allege rape by means of forcible compulsion and in that event any evidence relating to the incapacity of the alleged victim, Sue Blevins, to consent by reason of mental defect is a material variance from the indictment and, moreover, would only be used for purposes of unfairly prejudicing the jury against this Defendant.

These motions shall be heard before the Court at its regularly scheduled motion hour on Friday, September 12, 1980, at the hour of 9:30 a.m. or at an earlier date upon the agreement of the parties, in the Fayette County Courthouse, Lexington, Kentucky.

ROSENBAUM & ROSENBAUM

BY: /s/ Leslie Rosenbaum
Suite 300, The Lexington Building
201 West Short Street
Lexington, Kentucky 40507
(606) 259-1321

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motions was on this 4th day of September, 1980, delivered to Honorable Benny Hicks, Attorney for the Commonwealth of Kentucky, 275 West Main Street, Suite 300, Lexington, Kentucky 40507 and upon the Honorable Joe Bouvier, Attorney for Gary Blevins, Honorable Randy Morris, Attorney for Anthony V. Rucker, and Honorable Gene Lewter, Attorney for Buck Johnson, all of 317 West Short Street, Lexington, Kentucky 40507.

/s/ Leslie Rosenbaum
ATTORNEY FOR DEFENDANT

* * * * * * *

SEP 15 1980

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
SECOND DIVISION

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. RESPONSE TO NO. 80CR412
DEFENDANT'S DISCOVERY MOTION

CHARLIE KING, ET AL. DEFENDANTS

* * * * * *

Comes now, the Commonwealth, by and through counsel, and responds to the Defendant's various motions as follows:

1. As stated in open court by the Commonwealth, the Defendant, Charlie King, is responsible for the acts of the other individuals in counts 1 and 2 by being an aider and abettor to Buck Johnson and Anthony Rucker in the rape of Sue Blevins. Charlie King is responsible as both a principal and an aider and abettor in count 3 of the indictment.

2. The Commonwealth intends to prove that on the date alleged in the indictment in Counts 1 and 2 that Charlie King along with Gary Blevins and others threatened the use of force upon Sue Blevins unless she engaged in sexual intercourse with various individuals at 1023½ Cramer Avenue. The proof will be that Gary Blevins held in his hand a nightstick or a club resembling a nightstick and struck his palm in an

attempt to threaten Sue Blevins. It will also be alleged that Charlie King encouraged Buck Johnson and others to have sexual intercourse with Sue Blevins.

3. The proof for the Commonwealth regarding count 3 will be that Charlie King provided a room in the apartments that he runs for Gene Ross to engage in sexual intercourse for a fee with Sue Blevins. The Commonwealth will also call a witness by the name of Kim Christianson who will testify that she split the thirty dollars ($30) that Gene Ross paid for having sex with Sue Blevins with Charlie King.

4. The Commonwealth has provided the Defendant and his attorney with copies of the written or recorded statements made by Charlie King. The individuals present during the commission of the offenses listed in counts 1 and 2 of the indictment are as follows: Charlie King, Buck Johnson, Gary Blevins, Sue Blevins, Stevie King, and Anthony Rucker. The addresses for these individuals as known to the Commonwealth at this time is as follows: Rucker, 328½ Owsley Avenue; Sue Blevins, 849 Furlong, Lexington, Kentucky; Stevie King, living with his father; Buck Johnson, Fayette County Detention Center; and Gary Blevins, living with or renting from Charlie King. The Commonwealth does not know the address at this time of Kim Christianson. Mr. Gene Ross supposedly is still working for Sutton Plumbing. The other individuals who have information pertaining to this event are Detective Hal McKinney, Sgt. Andy Carter,

and Detective Gary Powell, all of the Lexington Metro Police Department. Two additional witnesses who have information pertaining to this indictment are Leitha Pash, 3608 Crosby Drive, and Carolyn Flynn, 849 Furlong Drive, Lexington, Kentucky.

5. The Commonwealth does not know of any exculpatory evidence on Charlie King's behalf.

Respectfully submitted,

/s/ Benjamin P. Hicks
BENJAMIN P. HICKS
ASSISTANT COMMONWEALTH'S ATTORNEY

This is to certify that a true copy of the foregoing Response has been served upon the Defendant Charlie King by mailing same to his attorney for record, Hon. Leslie Rosenbaum, Lexington Building, Lexington, Kentucky 40507 on this 12 day of September, 1980. (Hand delivery)

/s/ Benjamin P. Hicks
BENJAMIN P. HICKS

* * * * * * *

SEP 8 1980

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
SECOND DIVISION

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. ORDER INDICTMENT NO. 80-CR-412

CHARLIE KING, ET AL. DEFENDANTS

* * * * * * * * * * * *

This case was before the Court on Thursday, September 4, 1980, on various motions filed on behalf of the Defendant, Charlie King. The parties were represented by counsel, and the Defendant, Charlie King, also was present. The Court, being sufficiently advised, ORDERS as follows:

1. The motion of the Defendant, Charlie King, to dismiss Counts 1 and 2 of the indictment against him is overruled.

2. By agreement, Charlie King's motion for an order requiring the Commonwealth to inform him of the precise manner in which it is alleged that he is responsible for the acts of others is sustained, and by agreement of the Commonwealth, it is agreed that Charlie King's accountability, if any, is solely founded on the theory of aiding as defined in KRS 502.020(1)(b).

3. Charlie King's motion for a bill of particulars stating the exact manner in which the events alleged in Count 1 and 2 of the indictment occurred is sustained, and the Commonwealth shall furnish that information on or before September 12, 1980.

4. Charlie King's motion for a bill of particulars stating the date, time and place the events alleged in Count 3 of the indictment occurred and stating further the precise manner in which the events alleged in Count 3 of the indictment occurred is sustained, and the Commonwealth will furnish that information to Charlie King's attorney on or before September 12, 1980.

5. Charlie King's motion for a bill of particulars stating the names and addresses of each witness present when the events alleged in all counts of the indictment occurred, further stating the exact statements made by Charlie King and/or persons who were present with Charlie King at the time each of the events alleged in all counts of the indictment occurred, and further stating the names and addresses of each person known to the Commonwealth to have information relevant to the alleged events and all counts of the indictment is sustained, and this information shall be furnished to Charlie King's attorney on or before September 12, 1980.

6. Charlie King's motion for an order requiring the Commonwealth to furnish to him all evidence exculpatory as to Charlie King is sustained, and this

information shall be furnished on or before September 12, 1980, and the obligation of the Commonwealth to furnish such information shall be continuing.

7. Charlie King's motion for an order requiring the Commonwealth to furnish to him all investigative reports, tapes, notes, or memoranda of police officers and of witnesses concerning the events alleged in all counts of the indictment is overruled.

8. Charlie King's motion for an order prohibiting any of the parties or their witnesses from mentioning at the trial of this case or alluding to some faulty mental process on the part of the alleged victim, Sue Blevins, is taken under advisement.

9. Inasmuch as the Court has granted separate trials for all Defendants charged in the indictment, the trial for the Defendant, Charlie King, heretofore scheduled on September 15, 1980, is continued pending further orders of the Court.

/s/ N. Mitchell Meade
JUDGE, FAYETTE CIRCUIT COURT

TO BE ENTERED.

SERVICE AND NOTICE OF ENTRY WAIVED.

/s/ Benjamin P. Hicks
ATTORNEY FOR COMMONWEALTH

/s/ Leslie Rosenbaum
ATTORNEY FOR CHARLIE KING

* * * * * * *

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
SECOND DIVISION

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. INSTRUCTIONS TO THE JURY 80CR412

CHARLIE KING DEFENDANT

* * * * * * * * * * *

1. General Instructions

This court has previously advised you that you were to assume the defendant to be innocent of the charges against him. This assumption places two burdens upon the Commonwealth: first, of producing evidence of the guilt of the accused; and second, of persuading you of his guilt beyond a reasonable doubt. If upon the whole case you have a reasonable doubt as to the defendant's guilt on any count, you shall find him not guilty of the charge.

As to counts 1 and 2, if you find the defendant guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree. Instructions 2 and 4 are the higher degrees and Instructions 3 and 5 are the lower degrees for their respective counts.

AUTHORIZED VERDICTS

Counts 1 and 2:
NOT GUILTY or GUILTY:
first degree rape, or criminal facilitation

Count 3:
NOT GUILTY or GUILTY:
second degree promoting prostitution

Instruction No. 2
(Count 1)
First Degree Rape

You will find the defendant guilty under this instruction if you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about February 24, 1980, Anthony V. Rucker engaged in sexual intercourse with Sue Blevins without her consent;

(b) That Gary Blevins used forcible compulsion to make Sue Blevins engage in sexual intercourse with Anthony Rucker;

(c) That the defendant aided, counseled or attempted to aid Gary Blevins in making Sue Blevins engage in said sexual intercourse;

AND

(d) That in so aiding, counseling or attempting to aid Gary Blevins (if he did so), the defendant intended to make Sue Blevins engage in sexual intercourse with Anthony Rucker.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than 10 years nor more than 20 years, in your discretion.

Instruction No. 3
(Count 1)
Criminal Facilitation

If you do not find the defendant guilty under Instruction 2, you will find him guilty under this instruction if you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about February 24, 1980, Anthony V. Rucker engaged in sexual intercourse with Sue Blevins without her consent;

(b) That Gary Blevins used forcible compulsion to make Sue Blevins engage in sexual intercourse with Anthony Rucker;

(c) That the defendant aided, counseled or attempted to aid Gary Blevins in making Sue Blevins engage in said sexual intercourse;

AND

(d) That in so doing, the defendant knew that he was providing Anthony Rucker with the means or opportunity to engage in sexual intercourse with Sue Blevins without her consent.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than 1 year nor more than 5 years, in your discretion.

Instruction No. 4
(Count 2)
First Degree Rape

You will find the defendant guilty under this instruction if you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about February 24, 1980, Buck Johnson engaged in sexual intercourse with Sue Blevins without her consent;

(b) That Gary Blevins used forcible compulsion to make Sue Blevins engage in sexual intercourse with Buck Johnson;

(c) That the defendant aided, counseled or attempted to aid Gary Blevins in making Sue Blevins engage in said sexual intercourse;

AND

(d) That in so aiding, counseling or attempting to aid Gary Blevins (if he did so), the defendant intended to make Sue Blevins engage in sexual intercourse with Buck Johnson.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than 10 years nor more than 20 years, in your discretion.

Instruction No. 5
(Count 2)
Criminal Facilitation

If you do not find the defendant guilty under Instruction 4, you will find him guilty under this instruction if you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about February 24, 1980, Buck Johnson engaged in sexual intercourse with Sue Blevins without her consent;

(b) That Gary Blevins used forcible compulsion to make Sue Blevins engage in sexual intercourse with Buck Johnson;

(c) That the defendant aided, counseled or attempted to aid Gary Blevins in making Sue Blevins engage in said sexual intercourse;

AND

(d) That in so doing, the defendant knew that he was providing Buck Johnson with the means or opportunity to engage in sexual intercourse with Sue Blevins without her consent.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than 1 year nor more than 5 years, in your discretion.

Instruction No. 6
(Counts 1 & 2)
Definitions

"SEXUAL INTERCOURSE"—Means sexual intercourse in its ordinary sense but is limited to sexual intercourse between persons not married to each other. Sexual intercourse occurs upon any penetration, however slight.

"FORCIBLE COMPULSION"—Means a threat, express or implied, that overcomes earnest resistance by placing a person in fear of immediate death or physical injury to herself.

"PHYSICAL INJURY"—Means substantial physical pain or any impairment of physical condition.

Instruction No. 7
(Count 3)
Second Degree Promoting Prostitution

You will find the defendant guilty under this instruction if you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about February 1980, he knowingly provided a place for Sue Blevins to engage in prostitution, he knowingly received money for Sue Blevins' act of prostitution, or did both of these acts;

AND

(b) That in so doing (if he did so), Sue Blevins was less than 18 years of age.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than 1 year nor more than 5 years, in your discretion.

Instruction No. 8
(Count 3)
Corroboration

You cannot convict the defendant of promoting prostitution solely on the testimony of Sue Blevins unless it is supported by other evidence tending to connect the defendant with the commission of the offense. Such other evidence is not sufficient for that purpose if it merely shows that such offense was committed by someone and the circumstances under which it was committed.

Instruction No. 9
(All Counts)
Unanimous Verdict

The verdict of the jury as to each count must be unanimous and be signed by one of you as Foreman. You may use the forms provided below in writing your verdict.

AS TO COUNT 1:

(a) We the jury find the defendant NOT GUILTY.

FOREMAN /s/ Joe Warren Jr.

(b) We the jury find the defendant GUILTY under Instruction _____ and fix his punishment at _____.

FOREMAN _____

AS TO COUNT 2:

(a) We the jury find the defendant NOT GUILTY.

FOREMAN _____

(b) We the jury find the defendant GUILTY under Instruction Four and fix his punishment at Fourteen Years.

FOREMAN /s/ Joe Warren Jr.

AS TO COUNT 3:

(a) We the jury find the defendant NOT GUILTY.

FOREMAN _____

(b) We the jury find the defendant GUILTY under Instruction Seven and fix his punishment at One Year.

FOREMAN /s/ Joe Warren Jr.

* * * * * * *

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No. 82-80

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CHARLES KING - - - - - - - Petitioner

vs.

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for Writ of Certiorari
To the Court of Appeals of Kentucky

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STEVEN L. BESHEAR
Attorney General

STEPHEN L. FRANK
Assistant Attorney General
Office of the Attorney General
Capitol Building
Frankfort, Kentucky 40601
(502) 564-4038
Counsel for Respondent

Of Counsel:
VIRGIL W. WEBB III
Assistant Attorney General

WESTERFIELD-BOWTE CO., 640 W. KENTUCKY-P.O. BOX 2281, LOUISVILLE, KY.

QUESTIONS PRESENTED

I.

Whether Petitioner Was Denied the Right to Confront the Witnesses Against Him When the Court Admitted Into Evidence a Tape Recording Made by Petitioner Contemporaneous with the Crime Which Contained Remarks of Petitioner's Partners in Crime as Well as Those of Petitioner Where Petitioner's Partners in Crime Did Not Testify at the Trial?

II.

Whether the Application of Ky. Rev. Stat. §510.145 in This Case Denied Petitioner His Right to Confront the Witnesses Against Him?

III.

Whether the Court of Appeals of Kentucky Erred In Ruling That It Was Not Necessary to Give the Corroboration Instruction Requested by Petitioner?

IV.

Whether the Other Alleged Errors Raised by Petitioner Rendered His Trial so Fundamentally Unfair as to Deny Him Due Process of Law?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-80

CHARLES KING - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

May it please the Court:

The respondent, Commonwealth of Kentucky, prays that the petition for writ of certiorari to review the opinion of the Court of Appeals of Kentucky rendered December 23, 1981 be denied.

OPINION BELOW

The Opinion of the Kentucky Court of Appeals, the order denying the petition for rehearing, and the order of the Kentucky Supreme Court denying discretionary review are set out in the appendix to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are set out in the petition.

STATUTORY PROVISIONS INVOLVED

In addition to those set out in the petition, the case involves Kentucky Rule of Criminal Procedure (RCr) 9.72, which at the time of the trial read:

> JURY TO TAKE EXHIBITS
>
> Upon retiring for deliberation, the jury may take all papers and other things which have been received as evidence in the case.

STATEMENT OF THE CASE

Petitioner was indicted in Fayette Circuit Court in August of 1980. Count one of the three count indictment charged that he, Buck Johnson and Gary Blevins committed rape contrary to Ky. Rev. Stat. § 510.040 by making Penny Sue Blevins engage in sex with Anthony Rucker by forcible compulsion. Count two charged that King, Gary Blevins and Buck Johnson made Penny Sue Blevins engage in sex with Johnson by forcible compulsion. A third count charged King with second degree promoting prostitution (Transcript of the Record, hereinafter "T.R.", 2-3). King's guilt on the rape charges was to be proven under Ky. Rev. Stat. § 502.020(1)(b) which permits one who aids or counsels one who commits an offense to be found guilty of the crime (T.R. 14).

In support of the promoting prostitution charge the Commonwealth produced several witnesses.

Kim Christianson, a sixteen year old girl, testified the Sue Blevins, the girl later raped, had sex with a man named Gene Ross for thirty dollars. After the sex he laid three ten dollar bills on the table of which Kim got ten dollars and King got twenty dollars. The event took place in an apartment beside a laundromat, both of which are owned by petitioner (Transcript of Evidence, Trial Volume I, hereinafter "T.E. I", 81). King was not present during the incident (T.E. I, 80), but after Ross and Blevins came out of the bedroom King asked Ross, ". . . was that the best piece he's had in a long time . . ." (T.E. I, 81). At some time King had asked Kim if she wanted to "pimp" Sue "off" (T.E. I, 82). King told Kim that she was to charge thirty dollars for the sex. The proceeds would be divided three ways (T.E. I, 85). Kim testified that she was afraid of King (T.E. I, 96).

Herbert Gene Ross admitted paying thirty dollars for sex with Sue Blevins. He said the event took place in February 1980 at the apartment owned by petitioner (T.E. I, 98). Kim Christianson asked him if he wanted to buy sex. She said the price was thirty dollars. Ross left three ten dollars bills on the table (T.E. I, 101). He recalled that King made a statement similar to the one attributed to King by Kim.

Petitioner also thought "maybe" he might have made that statement (T.E. III, 416).

Penny Sue Blevins, also sixteen at the time of the crimes, testified that the incident with Ross took place

on the Tuesday before the rape (T.E. II, 204). On Monday Kim and King approached her about becoming a prostitute. Kim was to be the pimp (T.E. II, 201-203). From the thirty dollars paid by Ross, King took ten dollars, Kim got ten dollars and King put Sue's ten dollars in a book (T.E. II, 204). Sue also testified that King told her she would have to leave the apartment petitioner provided Sue and her husband if she did not become a prostitute (T.E. II, 229).

The rape occurred in the following way.

On the Saturday following the Ross incident, Sue told King's daughter about her arrangement with King. King's daughter called petitioner's wife and had Sue tell her as well (T.E. II, 205-206).

King's wife came to the laundromat, slapped King, Sue, and Sue's husband, Gary (T.E. II, 206). King's wife also testified that after being slapped, Sue told her that Sue had been to bed with King (T.E. III, 311, 313). Mrs. King took her rings, threw them at King, told him she wanted a divorce and left (T.E. III, 315).

That evening, Sue Blevins fought with Kim and King pulled Sue out of harm's way (T.E. II, 207). At some time during the evening King hit Sue's hand and injured her thumb (T.E. II, 228-229).

Later that night petitioner made a tape recording of a conversation during which he attempted to get Sue to admit that she had lied to Mrs. King. At the trial King acknowledged that Sue did not say she had lied to Mrs. King (T.E. III, 406-407). Petitioner admitted making this part of the tape (T.E. III, 378).

On the tape King repeatedly threatened Sue. He said that he would have Kim Christianson and other girls beat Sue, perhaps to death (Tape, T.E. II, 211-212). He also said, "And you don't know what I've got in store for you (unintelligible). You ain't seen nothing yet. I've got some things you don't even know about got's to happen to you that you're going to be sorry for" (Tape, T.E. II, 213).

The victim testified that while King was threatening her, Gary Blevins, Stevie King (petitioner's son), and Buck Johnson came into the room (T.E. II, 218). The tape details how petitioner, Gary Blevins and the others forced her to have sex with Johnson. The rape occurred in the apartment used for the prostitution. That apartment is in the same building where Sue Blevins lived (T.E. II, 200, 202).

On the tape recording petitioner is heard to say: "Sue—Sue, don't play the nice girl on me, tramp, you better get your ass over there with him [Johnson] . . ." A moment later King said: "Sue, if you don't get over there, you know, we'll figure out a way . . ." (Tape, T.E. II, 220).

Petitioner has never disputed the accuracy of any part of the tape recording.

The victim testified that she had sex with Johnson because she was afraid of the men who were threatening her. Earlier, Blevins had whipped her with a belt and had blacked her eye. On the night of the rape Blevins was brandishing a nightstick and she feared he would strike her again if she did not submit (T.E. II, 224-225). King had injured her thumb that night

(T.E. II, 228). She said she was afraid of King (T.E. II, 279).

The victim's testimony was supported by other witnesses. Letha Pash, the victim's sister by adoption, testified that around 2:30 or 3:00 a.m. she heard Sue screaming. The next morning Sue had a swollen thumb and appeared to have been crying (T.E. I, 109-111).

Laura Clouse, Sue's sister-in-law, saw Sue the next morning. She said Sue appeared to have been crying. Sue told her she was afraid to go back to her own apartment (T.E. I, 124-125). Although Sue did not say she had been raped, she did say she had been kicked and that her thumb had been broken. Sue also said she had not been permitted to eat anything on the night of the rape. During the time Mrs. Clouse was with the victim, Sue cried repeatedly (T.E. II, 129-130).

George Clouse, Sue's brother by adoption, said that Sue appeared to have been beaten and kept crying. He said, "you couldn't make heads nor tails out of what she was saying and just crying and really tore up" (T.E. I, 134).

King testified that he was innocent of any involvement in Sue's prostitution activity (T.E. III, 365-367). As to the rape, he testified that he did not make the part of the tape which dealt with the rape (T.E. III, 391). He encouraged Sue to make advances to Johnson but used no force (T.E. III, 394). After the tape was played during his cross-examination, he said that during the making of the tape Sue was enjoying what was happening (T.E. III, 429).

Petitioner was convicted of rape as to the count involving Buck Johnson. He was also convicted of second degree promoting prostitution. In accord with the jury's verdict, on October 18, 1980, he was sentenced to fourteen years on the rape charge and one year on the promoting prostitution charge. The sentences were ordered to be served consecutively (T.R. 67-70).

Petitioner's conviction was affirmed by the Kentucky Court of Appeals in an unpublished opinion. The Kentucky Supreme Court denied discretionary review. This petition followed. Respondent will set out additional facts relating to each of petitioner's contentions in the section of its brief which details the reasons for denying the petition.

REASONS FOR DENYING THE WRIT

I.

The Ruling of the Trial Court That Taped Statements of Petitioner and His Partners In Crime Made During the Crime Were Admissible Was in Accord with Rulings of this Court.

The tape in question was made by petitioner himself (T.E. II, 218). The tape was made contemporaneous to the crime. It recorded the voice of petitioner and those he aided and encouraged in forcing the victim to have sex. Admission of the unedited tape into evidence did not deny petitioner his right under the Sixth Amendment of the United States Constitution to confront the witnesses against him.

The tape was properly admitted under the well established rule which permits the introduction of acts, appearances and declarations of joint participants in a criminal venture against each participant for the purpose of presenting the situation at the time of the crime. It is not necessary that the participants be charged as conspirators. *St. Clair* v. *United States*, 154 U. S. 134 (1894). The statements were made in petitioner's presence during the joint commission of the crime. They were part of the *res gestae* surrounding the crime and were admissible regardless of whether Gary Blevins and the others testified at the trial. *States* v. *Chee*, 422 F. 2d 52 (9th Cir. 1970).

Out of court statements constitute hearsay only when offered to prove the truth of the matter asserted. *Anderson* v. *United States*, 417 U. S. 211, 219 (1974). In this case the statements were competent to allow the jury to infer petitioner's state of mind without regard to the truth of the statements, therefore the hearsay rule is clearly inapplicable. *United States* v. *Rivers*, 468 F. 2d 1355 (4th Cir. 1972), cert. denied 411 U. S. 969 (1973). The statements were not offered as assertions but as utterances contemporaneous with the force applied on the victim, related to it and which threw some light upon it. Admission of these non-hearsay statements made by persons who did not testify did not violate petitioner's right to confront the witnesses against him. *United States* v. *Jackson*, 588 F. 2d 1046 (5th Cir.), cert. denied 442 U. S. 941 (1979).

Even if the statements could be categorized as hearsay they were admissible under the rule which

allows the out-of-court statements of any conspirator to be admitted into evidence against fellow conspirators. This Court has stated the reason for the rule as follows:

> The rationale for both the hearsay conspiracy exception and its limitations is the notion that conspirators are partners in crime . . . As such, the law deems them agents of one another. . . .
>
> *Anderson, supra,* 218 n. 6 (citations omitted).

Although the rule is most often applied in conspiracy cases it is clear that it is equally applicable to any case in which one partner in crime makes a statement which is introduced against his accomplice. For example, in *Dutton* v. *Evans,* 400 U. S. 74 (1970), the prosecution was for the substantive offense of murder rather than conspiracy. See *Dutton, Id.,* 83 n. 14.

Dutton concerned the question of whether the admission into evidence against Evans of a statement by an accomplice who did not testify violated the right of Evans to confront the witnesses against him. The court noted that the statement contained no assertion about a past fact, that the declarant had personal knowledge of the matter about which he spoke, that there was virtually no chance that the statement was founded on faulty recollection and that the statement was spontaneous, therefore the statement carried sufficient indicia of reliability to allow its admission. *Dutton, Id.,* 88-89. The court also stated:

> The decisions of this Court make it clear that the mission of the Confrontation Clause is to ad-

> vance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' California v. Green, 399 U. S., at 161, 90 S. Ct., at 1936. . . .
>
> *Dutton, Id.,* 89.

Like the statements in *Dutton,* the tape recording bore sufficient indicia of reliability to warrant its being placed before the jury. The tape was made by King himself at the time of the rape. The accuracy of the tape is unquestioned. It records the spontaneous utterances of the participants in the rape. Petitioner, while not able to cross-examine his accomplices, was able to cross-examine the victim about the circumstances surrounding the statements and what she understood the remarks to mean. There was no denial of King's right to confront the witnesses against him.

Petitioner also complains that the Commonwealth should be required to show that Gary Blevins and the others were unavailable. Blevins had informed the prosecutor if called to testify he would invoke his right under the Fifth Amendment not to incriminate himself (T.E. I, 4). It would have been reversible error for the prosecution to call him to the witness stand. *Commonwealth* v. *Brown,* 619 S. W. 2d 699 (Ky., 1981). Blevins was most certainly unavailable. In any event in cases like the one at bar involving statements by accomplices, the utility of trial confrontation is remote and there is no requirement that the declarant be un-

available. See *Dutton, supra,* and *Ohio* v. *Roberts,* 448 U.S. 56, 65, n. 7 (1980).

Finally, petitioner argues that the harmless error rule enunciated by this Court in *Chapman* v. *California,* 386 U. S. 18 (1967), and *Harrington* v. *California,* 395 U. S. 250 (1969), does not apply to the case at bar. This contention was not raised by petitioner in any of the courts below and thus should not be considered by this Court. *Sonzinsky* v. *United States,* 300 U. S. 506 (1937).

Nor is petitioner correct in assuming that the rule is not applicable. The fact that the alleged error involves the right of an accused to confront the witnesses against him does not automatically render the rule inapplicable. *Harrington* itself involved an alleged violation of the Confrontation Clause.

In *Brookhart* v. *Janis,* 384 U. S. 1 (1966), upon which petitioner relies for his assertion that denial of effective cross-examination may never be harmless, the issue was one of waiver. This Court was merely quoting the respondent's brief when it stated:

> . . . '[I]f there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'
>
> *Brookhart, Id.* 3.

Although this Court in *Davis* v. *Alaska,* 415 U. S. 318 (1974), quoted the above language in its opinion, it was not necessary for the Court in *Davis* to modify the *Harrington* rule and establish a *per se* rule to

achieve the result obtained. The defense in *Davis* was denied the opportunity to question a crucial witness who had a criminal record about his relationship with the authorities. Clearly the right to effectively cross-examine such a witness may never be harmless error, however it does not follow that any denial of the right to cross-examine a witness may never be harmless without regard to what cross-examination is denied and regardless of the facts in the case. See *United States* v. *Price,* 577 F. 2d 1356 (9th Cir. 1978), cert. denied, 439 U. S. 1068 (1979).

In this case there was overwhelming evidence against petitioner aside from the statements of his partners in the venture. There were his own statements on the tape which were utterly devastating to his defense. His trial testimony consisted of the lame explanation that notwithstanding the tape, the victim enjoyed herself. Sue Blevins testified and was extensively cross-examined. Her testimony was corroborated by other witnesses who testified to her hysteria and battered condition on the morning following the rape. The error, if any, in admitting the unedited tape was harmless beyond a reasonable doubt.

II.

The Application of Kentucky's Rape Shield Law Did Not Deny Petitioner His Right Under the Sixth Amendment of the United States Constitution to Confront the Witness Against Him.

The Court of Appeals of Kentucky in the instant case ruled that Ky. Rev. Stat. § 510.145, the rape shield

law, did not violate either the Kentucky or the United States Constitution. Its holding was based upon *Smith* v. *Commonwealth,* 566 S. W. 2d 181 (Ky. App. 1978), wherein the Court stated:

> Is KRS 510.145 constitutional? This question apparently has not be answered in this jurisdiction. We believe the statute is constitutional and is a valid exercise by the legislature of this Commonwealth to prevent the victim in a sexually related crime from becoming the defendant at a trial. . . .
>
> *Smith, Id.,* 183.

The Court in Smith went on to say that the legislature correctly concluded that juries placed to much emphasis on evidence of the victim's prior sexual conduct and that . . . "evidence of prior sexual conduct has little probative value, at best" *Smith, Id.,* at 183. See also *Bell* v. *Harrison,* 670 F. 2d 656 (6th Cir. 1982), which held that Tennessee's rape shield law did not deny an accused the right to confront the witnesses against him. The Court stated the rationale for the rape shield laws as follows:

> The rationale behind these statutes is that evidence of a rape victim's prior sexual activity is of dubious probative value and relevance and is highly embarrassing and prejudicial. Often such evidence has been used to harass the prosecuting victim. Sponsors of these statutes assert that they encourage victims of sexual assault to report the crimes without fear of having their past sexual history exposed to the public.
>
> *Bell, Id.,* 658.

Evidence of the victim's prior sexual conduct with those other than petitioner was not relevant to the issue of consent. *United States* v. *Nez,* 661 F. 2d 1203 (10th Cir. 1981). Nor does the prior sexual conduct of the victim have any relevance to her credibility as a witness. *United States* v. *Kasto,* 584 F. 2d 268, 272 n. 3 (8th Cir. 1978), cert. denied 440 U. S. 930 (1979). The evidence was properly excluded under the statute.

In addition to the above reasons, the evidence was properly excluded because it was irrelevant to petitioner's theory of the case. This Court has stated that in the exercise of his right to present evidence and to confront the witnesses against him " . . . the accused as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers* v. *Mississippi,* 410 U. S. 284, 302 (1973). The testimony taken by avowal showed that although Sue's mother and aunt took Sue to bars it was not the mother's purpose to attract men. Sue's mother was not a prostitute and Sue did not have sex with the men her mother met (T.E. II, 292-293). Certainly, the conduct of Sue's mother and aunt had no bearing on whether Sue sought to destroy petitioner or on Sue's credibility. Sue said the encounters with her stepfather and brother-in-law were against her will (T.E. II, 295). Far from showing that she was a "sexual manipulator" the evidence showed that she was victimized by family members.

The evidence did not support an inference that she fabricated the charge to "hurt" petitioner. The vic-

tim did not report the rape or petitioner's involvement in it. She merely told her relatives that she had been beaten (T.E. I, 129). King told Gary Blevins to release the tape to Mrs. Clouse and she gave the tape to the police (T.E. II, 123-124, 126). It was King's own action that caused the charge to be brought.

The Sixth Amendment requires only that the accused be permitted to introduce all relevant and admissible evidence. The evidence of the victim's prior sexual activity which petitioner sought to introduce would have served no purpose beyond needlessly humiliating the victim and was properly excluded. *Smith* and *Kasto, supra.*

Finally, petitioner cross-examined the victim at length. During the course of the cross-examination he asked the victim about a statement she allegedly made about wanting to become a prostitute. He also brought to the jury's attention that when someone hurt the victim she liked to get even with them (T.E. II, 245-246). In addition, Sue was fully cross-examined about her part in the prostitution involving Gene Ross.

The scope of cross-examination is within the trial court's sound discretion. The right to cross-examine is not *carte blanche* and limitations on cross-examination give rise to reversible error only when the limitations deny the examiner the opportunity to effectively cross-examine in violation of the rights secured by the Sixth Amendment. *United States* v. *Haro,* 573 F. 2d 661 (9th Cir.), cert. denied 440 U. S. 930 (1978). The evidence against King was overwhelming. If the court erred in imposing the minor limitation on the cross-

examination of the victim about which petitioner complains, the restriction did not deny him the right to effectively cross-examine her and the error was harmless beyond a reasonable doubt. See *Price* and *Haro, supra.*

III.

The Court of Appeals of Kentucky Correctly Ruled That It Was Not Necessary to Give the Corroboration Instruction Requested by Petitioner.

Petitioner states that the trial court's refusal to give a requested corroboration instruction under RCr 9.62 violated the *ex post facto* clause of the United States Constitution, U. S. Const., Art. I, § 10 Cl. 1. It is true that the Kentucky Supreme Court in *Commonwealth* v. *Brown, supra,* held that the accomplice instruction was required in cases in which the crime occurred while RCr 9.62 was in effect. Although the Commonwealth in its brief, which was filed before *Brown* was decided, argued that there was no *ex post facto* violation, the Commonwealth argued in the alternative that the instruction was unnecessary even if RCr 9.62 was applicable in the case. In addition, the *Brown* decision was cited to the Court of Appeals at oral argument and was cited to the Kentucky Supreme Court in both the motion for discretionary review and the response to the motion. (See motion, p. 26, and response, p. 19.)

The decision of the Court of Appeals was not based upon any misinterpretation of the *ex post facto* clause nor did the court ignore the holding in *Brown.* The

court merely found that failure to give the instruction was harmless error. The case upon which the court relied was *Mishler* v. *Commonwealth,* 556 S. W. 2d 676 (Ky. 1977). In *Mishler* the court held that where there is sufficient evidence to support a conviction without the testimony of the accomplice, the instruction ordinarily required by RCr 9.62 need not be given.

In this case the testimony of the accomplice, Kim, was merely cumulative to the testimony of Sue Blevins. Sue's testimony was sufficient to convict petitioner. The jury was instructed that Sue's testimony must be corroborated by other evidence in order to convict King (T.R. 49). The corroboration was supplied by Gene Ross as to how payment was made and as to King's remark about whether Sue was the "best piece of pussy" Ross ever had had (T.E. I, 101-102).

Failure to give the instruction was not reversible error. *United States* v. *Shuckahosee,* 609 F. 2d 1351 (10th Cir. 1979), cert. denied, 445 U. S. 919 (1980); and *United States* v. *Wright,* 573 F. 2d 681 (1st Cir.), cert. denied 436 U. S. 949 (1978). It should also be noted that the error, if any, only affected petitioner's conviction for promoting prostitution since Kim's testimony did not concern the rape charge.

IV.

The Petitioner Was Not Denied Due Process of Law.

In the final section of his petition, petitioner raises a number of alleged errors which he argues denied him his right to a fair trial under the Fourteenth Amend-

ment of the United States Constitution. As respondent has noted in the previous section, the Kentucky courts did not ignore either decisions of this Court or their own decisions with regard to the accomplice instruction. In addition it is clear that petitioner received a fair trial.

The tape of the events which immediately preceded the sex was played four times. It was played so that the detective who took King's statement could identify the tape as the one played for King to refresh King's recollection of the events of the night of the crime (T.E. II, 181). The tape was relevant to explain the abrupt change in King's manner and responses to police questions. The victim identified the voices on the tape and explained what was occurring while the recording was made (T.E., 208-214). Petitioner was confronted with the tape on cross-examination to give him an opportunity to explain or deny the accuracy of the tape (T.E. IV, 427). There was no objection when the tape was played during the prosecutor's final argument (T.E. IV, 487). The tape served a legitimate purpose each time it was played and the court did not abuse its discretion in allowing the tape to be replayed. *United States* v. *Williams,* 548 F. 2d 228 (8th Cir. 1977). In addition, the replaying did not prejudice petitioner's rights inasmuch as RCr 9.72 allows the jury to have all papers and other things which have been admitted into evidence during its deliberations. Petitioner was told in advance that the jury would take the tape to the jury room when it retired but did not

raise an objection until the next day (T.E. IV, 478, 485).

Petitioner was not denied a fair trial when the court played a tape of King's conversation with police officers in which petitioner attempted to exculpate himself. Petitioner's statements on the tape did not concern Sue's past conduct. Petitioner stated that Sue said her mother and aunt were prostitutes (T.E. II, 150). On the tape petitioner also said Sue told him she wanted to be a prostitute (TE II, 153). Petitioner was allowed to cross-examine her about that alleged statement. In addition, on the tape petitioner made it clear that he did not approve of such conduct (TE II, 153).

There was no error in the prosecutor's statements concerning the victim's mental ability. The prosecutor stated, "It's also going to be apparent from her testimony that Sue Blevins has some mental retardation" (T.E. I, 25). The statement was merely a comment on what the evidence would show. The jury could observe the victim's demeanor and draw its own conclusion. In addition the evidence showed that Sue had only completed grade school and did poorly (T.E. I, 130-131). This supported the Commonwealth's contention that she had some degree of impairment. It is also obvious to anyone who reads the transcript in this case that she was often unable to understand questions which were asked of her and that the questions often had to be repeated or rephrased.

Finally, the trial court did not violate its own order. The court referred to the agreement between

King and the Commonwealth and stated that " . . . it is agreed that Charlie King's accountability, if any, is solely founded on the theory of aiding as defined in KRS 502.020(1)(b)" (T.R., 14). In its response to King's discovery motion the Commonwealth told King that it intended to show that King and Blevins threatened the use of force upon Sue Blevins. King was also specifically informed that the Commonwealth intended to rely upon Gary Blevins's conduct in brandishing a nightstick as part of the proof of forcible compulsion (T.R., 17). The instructions were in accord with the agreement and the trial court's order (T.R., 45).

CONCLUSION

The case at bar presents no new or novel issues. Petitioner received a fair trial. His conviction and the affirmance of that conviction were proper. The petition for writ of certiorari should be denied.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

STEPHEN L. FRANK
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

Of Counsel:
VIRGIL W. WEBB III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Of Counsel

PROOF OF SERVICE

I, Stephen L. Frank, one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24 day of September, 1982, I served the petitioner with Respondent's Brief in Opposition to Petition for Writ of Certiorari by placing three copies of the same in the United States mail, first class postage prepaid, and addressed to Hon. Robert Leslie Rosenbaum, Rosenbaum & Rosenbaum, Suite 200, The Lexington Building, 201 West Short Street, Lexington, Kentucky 40507, Counsel for Petitioner.

STEPHEN L. FRANK
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

Office - Supreme Court, U.S.
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CLERK

NO. 82-80

IN THE

Supreme Court Of The United States

October Term, 1982

CHARLES KING ..... Petitioner

versus

COMMONWEALTH OF KENTUCKY ..... Respondent

On Petition for Writ of Certiorari
To the Court of Appeals of Kentucky

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

ROBERT LESLIE ROSENBAUM, ESQ.
ROSENBAUM & ROSENBAUM
Suite 300, The Lexington Bldg.
201 West Short Street
Lexington, Kentucky 40507
(606) 259-1321

Counsel for Petitioner

PRINT MASTER, INC., 839 LANE ALLEN RD., LEXINGTON, KY. 40504, PH. (606) 276-4341

QUESTIONS PRESENTED:

I. WHETHER RESPONDENT'S OPPOSITION BRIEF MISSTATES THE CRUCIAL FACTS AND MISCONSTRUES THE LAW CONCERNING PETITIONER'S CLAIM THAT THE USE OF TAPED CONVERSATIONS OF NON-TESTIFYING DECLARANTS DENIED PETITIONER'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM?

II. WHETHER RESPONDENT MISCONSTRUES PETITIONER'S ARGUMENT REGARDING THE FACT THAT THE APPLICATION OF THE "RAPE SHIELD STATUTE" VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM?

III. WHETHER THE COURT OF APPEALS OF KENTUCKY INCORRECTLY RULED THAT IT WAS NOT NECESSARY TO GIVE THE CORROBORATION INSTRUCTION REQUESTED BY THE PETITIONER?

IV. WHETHER RESPONDENT'S AUTHORITIES ON THE ISSUE OF WHETHER PETITIONER'S TRIAL DENIED HIM DUE PROCESS OF LAW ARE ON POINT?

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NO. 82-80

IN THE

Supreme Court Of The United States

October Term, 1982

CHARLES KING, *Petitioner*

versus

COMMONWEALTH OF KENTUCKY, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Charles King, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered in the above entitled case on December 23, 1981.

OPINION BELOW

The Opinion of the Kentucky Court of Appeals, the order denying the petition for rehearing, and the

order of the Kentucky Supreme Court denying discretionary review are set out in the appendix to the petition.

JURISDICTION

The jurisdiction requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are set out in the petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in the petition and the brief in opposition to petition for certiorari.

STATEMENT OF THE CASE

Petitioner's version of the statement of the case is set forth in the petition.

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT

I. RESPONDENT'S OPPOSITION BRIEF MISSTATES THE CRUCIAL FACTS AND MISCONSTRUES THE LAW CONCERNING PETITIONER'S CLAIM THAT THE USE OF TAPED CONVERSATIONS OF NON-TESTIFYING DECLARANTS DENIED PETITIONER'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

The Respondent's brief at page 10 contains the following statement: "Blevins was most certainly unavailable." The support for this statement is a reference to the record where Respondent's trial counsel says that unless Blevins had changed his mind as of two weeks ago, he would take the Fifth Amendment and would not testify.

The Respondent's statement of fact that Blevins was unavailable is not true.

At no place in the record is there a statement by Blevins or someone on his behalf to the effect that if called, Blevins would avail himself of his privilege not to incriminate himself and would not testify. There was a recorded pre-trial hearing in the case, held on September 4, 1980, in which Blevins' attorney made a statement indicating that if all defendants were tried separately, then the co-defendants would probably be required to take the Fifth Amendment at the separate trials (PT 26). However, Blevins was tried first, and his trial took place on September 16, 1980. The sup-

plemental record on appeal indicates that at Blevins' trial, he took the witness stand, and his testimony at his own trial on September 16, 1980, consumed more than 30 pages of the record. Petitioner's trial did not commence until September 29, 1980, almost two weeks after Blevins' trial.

Leaving aside the question of whether Blevins could have successfully invoked his Fifth Amendment privilege after having testified at length in his own defense, it is false to say that Blevins was unavailable when the record does not show any attempt to inquire of Blevins at Petitioner's trial on what Blevins' position would be if Blevins were called upon to testify.

Respondent also misleads when citing the case of *Commonwealth* v. *Brown*, 619 S.W.2d 699 (Ky. 1981) for the proposition that Respondent could not have called Blevins to the witness stand to determine if the privilege would be invoked. That case only intimates that an inquiry as to whether the privilege will be invoked should be made outside of the presence of the jury. The case cited does not obviate the necessity of making the inquiry.

Likewise, Respondent's brief at page 5 misleads by intimating Blevins had whipped the "victim" with a belt, had blacked her eye, and was brandishing a nightstick in a threatening manner in Petitioner's presence. The record reveals the "victim" not only was not hit with a stick but was not hit with anything else, and Blevins, the husband, had a nightstick in a

bedroom when the two of them were alone (V II 225, 276, 275). The Petitioner was not connected with this.

The cases cited by Respondent either do not speak to the confrontation issue or are not on point.

Respondent's reliance on *St. Clair* v. *United States*, 154 U.S. 134 (1894), *Anderson* v. *United States*, 417 U.S. 211 (1974), and *United States* v. *Rivers*, 468 F.2d 1355 (4th Cir. 1972), *cert. denied*, 411 U.S. 969 (1973) is misplaced because these cases do not deal with confrontation issues but, instead, deal with evidentiary questions.

The other cases relied upon by Respondent are not on point.

United States v. *Jackson*, 588 F.2d 1046 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979) mentions a confrontation issue in a footnote at pages 1049-1050. The footnote reveals a situation where a non-testifying declarant was said to have given a package to a witness to carry from Los Angeles to Birmingham. Inasmuch as the non-testifying declarant's statement was not adverse to the defendant, no confrontation issue was presented.

In *United States* v. *Price*, 577 F.2d 1356 (9th Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979), a co-defendant's attorney was not allowed to cross-examine a police informer concerning her relationship with the police. However, the attorneys for the other co-defendants fully explored the subject. Although

the initial denial of cross-examination was error, it became harmless when the subject was fully explored by others.

Respondent's cited case of *United States* v. *Chee*, 422 F.2d 52 (9th Cir. 1970) is closest to being on point because the defendant in that case in fact raised the confrontation issue. The confrontation issue was decided adversely to the defendant, but *the decision seems to have been made solely upon evidentiary grounds.*

Chee, Id., is a case in which the Ninth Circuit seemed to equate constitutional confrontation values with evidentiary rules. *See, United States* v. *Zentgraf*, 310 F.Supp. 268 (N.D. Cal. 1970). However, *Chee* should be viewed as an isolated case because the Ninth Circuit later expressly recognizes the difference between constitutional values and evidence rules. *See, United States* v. *Fielding*, 630 F.2d 1357 (9th Cir. 1980) and *United States* v. *Nick*, 604 F.2d 1199 (9th Cir. 1979). These later decisions emphasize the question of availability of the non-testifying declarant.

It also should be noted that Respondent neglects to deal with the taped statements of the other non-testifying declarant, Petitioner's son. There is no claim that the son was unavailable.

Further, Respondent misconstrues the Petitioner's position at pages 11 and 12 of the Respondent's brief when Respondent states Petitioner

desires a change in the harmless error rule. Petitioner does not raise this contention. Instead, Petitioner states the use of the tape recording in the instant case cannot constitute harmless error when the Respondent played the tape for the jury four times and later gave the jury a battery operated tape recorder with which to listen to the tape time and time again until the batteries were exhausted.

II. RESPONDENT MISCONSTRUES PETITIONER'S ARGUMENT REGARDING THE FACT THAT THE APPLICATION OF THE "RAPE SHIELD STATUTE" VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM.

All of the cases cited by Respondent on this issue may be categorized as holding it is inadmissable to attempt to prove the victim of a rape was not a virgin at the time the assault occurred. Petitioner does not quarrel with this holding.

Petitioner does maintain that the facts of the instant case give rise to the inference that Sue Blevins was a sexual manipulator, skilled in prostitution, who in the past had used sex to destroy marital relationships such as the one the Petitioner had with his wife, and Sue Blevins had a motive to injure the Petitioner in using this type of activity in the instant case. These additional, factual inferences make the evidence probative and provide the reason why the application of the "Rape Shield Statute" violated Petitioner's right to confrontation.

III. THE COURT OF APPEALS OF KENTUCKY INCORRECTLY RULED THAT IT WAS NOT NECESSARY TO GIVE THE CORROBORATION INSTRUCTION REQUESTED BY PETITIONER.

The Kentucky Supreme Court in *Commonwealth* v. *Brown*, 619 S.W.2d 699 (Ky. 1981) held that the accomplice instruction was required in cases where the crime occurred while Ky. Rev. Stat. RCr 9.62 was in effect, the same situation as the instant case.

The Respondent's brief at page 16 in essence admits that there was an *ex post facto* violation and that *Commonwealth* v. *Brown*, 619 S.W.2d 699 (Ky. 1981) is controlling on this point. However, Respondent urges this Court merely to consider it as harmless error.

The error was not harmless because the only witnesses who connected Petitioner with the crime were not corroborated, and the other witnesses said Petitioner was not involved. Therefore, the only way Petitioner could have been convicted of promoting prostitution was to disregard Ky. Rev. Stat. RCr 9.62. In that situation, the error could never be harmless!

IV. RESPONDENT'S AUTHORITIES ON THE ISSUE OF WHETHER PETITIONER'S TRIAL DENIED HIM DUE PROCESS OF LAW ARE NOT ON POINT.

Respondent cites the case of *United States* v. *Williams*, 548 F.2d 288 (8th Cir. 1977) for the proposition that Respondent could play the tape recording four times during the trial and allow the tape to be

played repetitively in the jury room. The cited case merely holds that a jury correctly may request that a taped conversation introduced once into evidence may be played a second time for the jury during its deliberation if the jury so requests. The cited case deals with a situation which does not remotely resemble the instant case.

Further, Respondent cites a Kentucky rule of criminal procedure for the proposition that the jury may take all things introduced into evidence into the jury room. While the cited rule superficially agrees with Respondent's contention, the interpretation of this rule in Kentucky case law shows the Respondent's position to be incorrect. The jury may not take depositions into the jury room. *Louisville H. & St. L. Ry. Co.* v. *Morgan*, 62 S.W. 736 (Ky. 1901), *Security Finance Co.* v. *A. L. Cook & Son*, 3 S.W.2d 187 (Ky. 1928), *Thompson* v. *Walker*, 565 S.W.2d 172 (Ky. App. 1978), *Williams* v. *Watson*, 268 S.W. 1067 (Ky. 1925). Neither may the jury take indictments to the jury room in criminal cases. *Richardson* v. *Commonwealth*, 483 S.W.2d 105 (Ky. 1972).

Regardless of whether this procedure would be proper under Kentucky procedural rules, the use of the tape recording in the jury room denied Petitioner due process of law.

Respondent argues that Petitioner was not denied due process because the trial court did not violate its own order concerning the accountability of Petitioner

for the acts of his co-defendants. Under the "complicity" statute, Petitioner would have been guilty either by aiding or abetting or by engaging in a conspiracy. As shown at page 8 of the original petition, the Respondent expressly represented that no conspiracy was involved and that Petitioner's guilt was by being an aider or abettor to co-defendants, Johnson and Rucker. Nothing was said about Gary Blevins. This was embodied in an order signed by the court and entered into the record. However, the court instructed the jury that Petitioner was responsible for Gary Blevins' conduct even in face of the representation and order negating the existence of a conspiracy. Respondent attempts to rationalize this miscarriage of justice by stating that Respondent's trial counsel in a written response to Petitioner's discovery motions noted it would rely upon Gary Blevins' conduct. While such a representation was made by Respondent, the Petitioner was entitled to rely upon the order of the trial court and the representation that no conspiracy was involved instead of the Respondent's assertion as to its proof.

CONCLUSION

The courts of Kentucky have ignored and refused to follow the decisions of this Court and the provisions of the United States Constitution. The writ of certiorari should issue.

Respectfully submitted,

ROSENBAUM & ROSENBAUM

BY: Robert Leslie Rosenbaum

ROBERT LESLIE ROSENBAUM, Esq.
Suite 300, The Lexington Bldg.
201 West Short Street
Lexington, Kentucky 40507
(606) 259-1321

Attorneys for Petitioner